Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1708

STATE OF NEW YORK,

Petitioner,

and

S & E Shipping Corp. and Seafarers International Union of North America, AFL-CIO,

Respondents,

vs.

UNITED STATES of America and Interstate Commerce Commission,

Respondents,

and

Pennsylvania Public Utilities Commission, Consolidated Rail Corporation, Soo Line Railroad Company and ConAgra, Incorporated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, in this cause in which it is claimed that an order of the Interstate Commerce Commission relating to the shipment of grain unlawfully discriminates against Great Lakes grain carriers, prays that a *writ of certiorari* be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case January 31, 1980, in which the Court denied rehearing and adhered to an order of the Court dated May 7, 1979 (Appendix "C"), affirming an order of such Commission made January 18, 1978 (Appendix "B").

Opinion Below

The opinion for affirmance by the Court of Appeals was handed down May 7, 1979 and is reported at 600 F2d 349. It is set forth as Appendix "C".

Jurisdiction

Decision and mandate of the Court of Appeals was entered on May 7, 1979 (Appendix "C"). A Petition for Rehearing was timely filed. Rehearing was denied by order of the Court of Appeals dated January 31, 1980 (Appendix "F").

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by *writ of certiorari* is 28 USC §1254(1).

Question Presented

Whether a disparity in freight rates between carrying wheat on all-rail routes and carrying wheat from a connecting lake carrier is discriminatory under the provisions of the Interstate Commerce Act §3(4), where the rail rate for a ton-mile is approximately twice as high for the lake-rail route than for the all rail-route and where there is no evidence of such a disparity in costs of transportation.

Statute of the United States Involved

Interstate Commerce Act, §3, subd 4 (49 USC §3, par [4]):

"**§3, par. (4). Interchange of traffic.** All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any

connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title."

Statement of the Case

Involved in this proceeding is an order of the Interstate Commerce Commission, hereinafter referred to as Commission, dated January 18, 1978 (356 ICC 82, Appendix "B") which approved rates for transportation of wheat from Minneapolis and St. Paul, Minnesota (Twin Cities) and Duluth, Minnesota and Superior, Wisconsin (Twin Ports) to Martins Creek, Pennsylvania where ConAgra, a shipper, has its mill. The proposed schedule includes summer and winter rates.* The issue here is whether the disparity in the proposed rates for transportation of wheat from Twin Cities and Twin Ports to Martins Creek, Pennsylvania by an all-rail route and that of transporting wheat from a connecting lake-carrier at Buffalo, New York to Martins Creek was discriminatory within the provisions of Interstate Commerce Act, §3, subd 4, hereinafter referred to as section 3(4).

The railroads involved are the Soo Line Railroad Company (Soo), which carries wheat from the point of origin to Chicago and the former Erie Lackawanna Railway Company, now Consolidated Rail Corporation (ConRail), which carries wheat from Chicago to Martins Creek either directly or through Buffalo.

The summer rates are those involved when the Great Lakes are open to navigation and the winter rates are those in effect when the lakes are closed to lake carrier transportation. The lake-rail route is from Twin Ports to Buffalo by lake carrier and then by rail to Martins Creek.** The all-rail route, which moves wheat from Twin Cities and Twin Ports to Chicago and thence

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*The winter rates are not at issue in this proceeding.

**A straight line diagram of the rail and water routes is shown in *State of New York v United States*, 568 F2d 887 (2d Cir, 1977) at page 891 (Appendix A).

either directly to Martins Creek or through Buffalo to Martins Creek, competes with the lake-rail route.

The respective rail mileages are: Twin Ports and Twin Cities to Martins Creek, 1379 miles; Buffalo to Martins Creek, 340 miles, and Chicago to Martins Creek, 910 miles. The overall rail rate from Twin Ports and Twin Cities is 72.25 cents per hundred pounds, with 47 cents of that being paid to the carrier for services from Chicago to Martins Creek. khe rate from Buffalo to Martins Creek is 40 cents per hundred pounds.

The winter rates, when no competition exists from lake-rail routes, are higher. The winter rate for all-rail transportation is 88 cents per hundred pounds with 57 cents going to the shipper from Chicago to Martins Creek. The winter rate for shipments from Buffalo to Martins Creek is 47 cents per hundred pounds.

The following table is a breakdown of the summer rates.

Rail Route	Rate		Mileage		Revenue Per Mile
Twin Ports to Martins Creek	72.25¢	+	1,379	=	.0524¢
Chicago to Martins Creek	47¢	+	910	=	.0516¢
Buffalo to Martins Creek	40¢	+	340	=	.1176¢

(JA, p. 21)

The supplemental record shows that rates on both routes have been increased. However, the relative disparity between ton-mile transportation continues to be approximately the same.

Thus there is a ratio of about two to one in the rate for transportation of wheat per ton-mile from the Buffalo wheat carrier's port as against that on the all-rail route. The Commission in its first decision stated:

> Protestants also developed ratios of rates to costs for both the existing Buffalo to Martins Creek rate and Erie's division of the proposed rates. Thus the 40-cent Buffalo to Martins Creek rate yields 142 percent above variable costs for movements in railroad cars and 178 percent for

> shipper cars. On a fully allocated basis the excess is 73 and 90 percent, respectively. In comparison, the proposed rates will yield only 68 percent above variable costs for shipments in railroad cars and 60 percent in shipper cars. On a fully allocated basis the excess [is] 18 and 14 percent, respectively. 346 I.C.C. at 830. (JA, p. 457a).

It has been accepted in this proceeding that the yield per ton-mile from Buffalo to Martins Creek was substantially more profitable than those from the all-rail routes (346 ICC at 835; JA, p. 462a).

Prior Proceedings Before The Commission

The Commission first considered the rates in a report dated June 18, 1974 (346 ICC 814). The proposed rate for wheat shipment during the open navigation season from Twin Ports to Martins Creek was found to be lawful. The corresponding rate from Twin Cities was found to be unjust as unduly preferential to Twin Cities and prejudicial to Twin Ports in violation of Interstate Commerce Act, §3(1). Because of this, a new schedule was ordered in conformity with its report.

The State of New York then applied for and was granted leave to intervene in the reconsideration proceeding. By order dated June 27, 1975 (351 ICC 470), Division 2 of the Commission acting as an Appellate Division, denied reconsideration as to the rates which had been approved, and granted reconsideration with respect to the unlawfulness of the Twin Cities summer rate and reversed its prior finding that the Twin Cities summer rate was unlawful. It thus approved all rates.

Interest of the State of New York

This case involves movement of wheat which is milled into flour to be used and sold to residents of the State and others. The State's interest arises from its duty to protect its citizens, water carriers serving its ports and others. New York's interest,

whether called *parens patriae* or by any other name, results from the State's duty to protect the public interest.

The rates, if allowed to stand, will divert large shipments of wheat from the combined lake-rail route to the all-rail route, affecting the shipping industry and labor forces in Buffalo, New York. The proposed rates, because the costs of transportation are a significant element in the overall cost of flour and since they favor all-rail transport when compared to lake-rail transport, would result in a large amount of such traffic being diverted from Buffalo's port and harm the City's economic conditions, its labor forces and retard its further development. The disparity in rates between the all-rail route and the lake-rail route with transshipment at Buffalo unjustly discriminates against lake-water carriers serving Buffalo. There is no evidence of a cost factor as a reason for this disparity. The disparity is clearly detrimental to the public and to the lake carriers serving the State of New York.

First Court of Appeals Decision
(568 F2d 887 [2 Cir. 1977])

The order of the Commission was reviewed by the United States Court of Appeals for the Second Circuit in a proceeding in which New York State was the petitioner. The State claimed that both summer and winter rates from Twin Ports and Twin Cities were unlawful, being violative of sections 3(1) and 3(4) of the Interstate Commerce Act. The Court of Appeals found that the proposed rates did not violate section 3(1), but found there was discrimination under section 3(4). The order of the Commission was set aside "for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines".

The Commission had held that the lake carriers were not "connecting lines". That holding was reversed, the Court determining that the lake carriers were "connecting lines".

There followed a second proceeding before the Commission, which concluded in the order of January 18, 1978 and an appeal was taken from that order to the United States Court of Appeals for the Second Circuit.

Opinion of the Court of Appeals
(600 F2d 349; Appendix C)

The Court held that there was substantial evidence to support the Commission's finding that unit train service, which was available on the all-rail route, was more efficient and economical than movement in single or five-car lots used at Buffalo, and that normal utilization of unit train services was not available on the Buffalo to Martins Creek haul.

On the question of discrimination at the Port of Chicago,* the Court noted that ConRail is prepared to enter into equal rate arrangements with all "connecting carriers". As for Buffalo, it said that all "connecting carriers" are "already treated the same". The change favoring Chicago created another discrimination against Buffalo in that lake shippers in Chicago also have benefits of lower rail rates which lake shippers in Buffalo do not have.

Judge TIMBERS, however, dissented, stating (pp 353-354):

> "It is undisputed on the record before us that a rate differential, unjustified by cost differences, has been shown. The Commission so found: 356 I.C.C. at 92. The precise issue therefore is whether the railroads can justify charging twice as much to transport wheat over a rail route that connects with a water carrier than over the competing rail route that connects with another railroad, despite the fact that the rail revenue yield on the water-rail route is substantially higher than the yield on the competing rail route."

Judge TIMBERS also stated that the Commission's finding with respect to Chicago demonstrates that the discriminatory rail rates are not justified and are unlawful under section 3(4) and he would have directed the Commission to enter an order

*This discrimination was not raised by any of the parties.

cancelling the rates being challenged. Admittedly, such action would, as he stated, be "strong medicine", but in view of the "flagrant violation" of the Act "disclosed by the undisputed record before us" he was of the belief that such was the medicine to be prescribed.

A petition for rehearing was filed, and the Court by order dated October 3, 1979 (Appendix D) posed six questions to be answered at the rehearing. The following are the questions and the summaries of the answers provided by the State:

> "1. *Who are the lake carriers, if any, in this proceeding and how are they being discriminated against?*"

The S & E Shipping Corporation, a lake carrier, is protected by section 3(4) and is discriminated against. The State of New York has an interest in protecting its citizens from unlawful, discriminatory and prejudicial rates proposed by the Commission. The discrimination is that ConRail charges twice as much per mile when it connects with the lake carriers at Buffalo than when it connects with another railroad.

> "2. *Is the 40-cent rate from Buffalo to Martins Creek discriminatory and if so, how?*"

The 40-cent rate was not subject to the Commission's investigation and hence, was not attacked as discriminatory, *per se*. It is a part of the discriminatory rate structure that results from the proposal subject to investigation which was designed to capture traffic moving over the lake-rail route. This was done by lowering the all-rail route from Twin Ports and Twin Cities to Martins Creek and at the same time holding the lake-rail route up to a level that assured that traffic would be diverted from it to the all-rail route. The ConRail offers a lower rail rate at Chicago than when it connects with lake carriers at Buffalo and this disparity is prejudicial and discriminatory and prohibited by the Interstate Commerce Act.

> "3. *Are there other issues than the summer rates?*"

Only the summer rate is in issue.

"4. *Is there any question that the all-rail rates from the grain sources to Martins Creek are not proper?*"

Petitioner contends that the all-rail rate, which was subject to the investigation, is prejudicial and discriminatory.

"5. *What effect, if any, does the transhipment of grain at Buffalo from lake to rail have on the over-all rates from source to Martins Creek?*"

The overall level of the lake-rail rates is not an issue in the proceeding. The relevance of the Buffalo to Martins Creek rail rate is to show that the all-rail rate is discriminatory because the railroad charges twice as much to transport wheat per ton-mile when it connects with a lake carrier at Buffalo as it does when it connects with an all-rail carrier at Chicago.

"6. *What is ConAgra's position with respect to the respective lake-rail, all-rail transportation rates?*"

ConAgra's position is not relevant since the fact that a shipper benefits from a discriminatory rate structure does not justify the discrimination.

The order of October 3, 1979 also contained the following:

"No interest would be served by speculating on a Chicago lake-rail interchange. Once loaded at the source, economy would demand a through lake trip to Buffalo. Nor should there be argument based on bringing 50-car unit trains into Buffalo and shipping from that point to Martins Creek.

"* * * To S & E Shipping Corp. the Commission was 'to decide if there was discrimination, at Buffalo, not with the Chicago connection. . . .' (S & E Petition p. 3).

"However, the Buffalo-Martins Creek rate is not *per se* determinative of discrimination but only as related to the total rates from grain source to Martins Creek via lake-rail or all-rail methods of transportation. We had assumed that this Court was being asked 'to order the cancellation of the unti-train [sic] rates from Twin Ports and Twin Cities to Martins Creek because the Buffalo to Martins Creek rates are proportionately higher and more profitable.' "

After reargument both the majority and the minority adhered to the May 7, 1979 decision and order, 600 F2d 349 (see order dated January 31, 1980; Appendix "F").

REASONS FOR GRANTING THE WRIT

Lake carriers connecting with railroads at Buffalo are entitled to protection under section 3(4). This is so even though there is no connecting point at Buffalo on the competing all-rail route. The Court of Appeals for the Second Circuit so held in the first decision in this matter (*State of New York v United States*, 568 F2d 887, 897 [1977]). There the Court remanded the case to the Commission "for the limited purpose of determining whether the proposed rates discriminate against lake carriers as connecting lines". (898)

In the decision below (600 F2d 349, 350 [1979]), the Court again noted that the case was sent to the Commission to determine whether the discrimination existed and the Commission found that the proposed rates are not discriminatory. Judge Timbers stated, in his dissent, that the precise issue here is whether a railroad can justify "charging twice as much to transport wheat over rail route that connects with a water carrier than over a competing railroad that connects with another railroad" (353-354). As the Commission noted the protestants' position was that there is a *prima facie* case under section 3(4) which shifts the burden to the railroad to justify a disparity in rates (see *Western Pacific Railroad Company v United States*, 263 F Supp 140 [N.D. Cal. 1966]);* and that the Commission's justification of the disparity was the following:

> "In our view the evidence is convincing that the establishment of a new unit-train service over Buffalo would be inefficient, uneconomical, and counter-productive and that the existence of such operating deficiencies justify the disparity in rates or divisions as between the connecting lines. 356 I.C.C. at 92. (JA, p. 182]."

*Decision by District Court as a result of remand (382 US 237).

The dissenting opinion by Judge Timbers answers this as follows:

> "The crux of the Commission's error is that, rather than making a determination of the discrimination issue on the basis of existing actual conditions on the Buffalo-Martins Creek run (which was the clear import of our remand), it has come up with a decision based on a hypothetical new unit-train service (which is totally beyond the scope of our mandate). In short, the Commission simply has not made the determination required by our mandate." (600 F2d 349)

In its order of October 3, 1979, after posing six questions to be answered by the parties, the Court below stated:

> "Nor should there be argument based on bringing 50-car unit trains into Buffalo and shipping from that point to Martins Creek." (Appendix "D")

Thus, after advising the protestants not to argue the question of the new 50-car unit trains, apparently because it was irrelevant, the majority adhered to its prior holding to the contrary which supported this position of the Commission that there is no discrimination based on this hypothetical new train unit. The Commission's position was that the establishment of a new unit train service would be inefficient, uneconomical and counter-productive.

To support the disparity in rates for transportation from Buffalo to Martins Creek against the all-rail transportation, it was incumbent on the Commission to find that such a disparity existed in the cost of transportation from Buffalo to Martins Creek as against the all-rail route. The record does not support such a finding and would not, even if a disparity were established, justify a rate twice as high per ton-mile for transporting wheat from Buffalo to Martins Creek as against the all-rail route. The railroads had the burden to and failed to establish that the disparity in rates was justified (*Seatrain Lines, Inc. v United States*, 233 F Supp 199, 209 [DNJ, 1964]). It is conceded

that the railroad earns twice as much per mile-ton after expenses from its Buffalo to Martins Creek rate as from its Chicago to Martins Creek rate. The rate disparity here, rather than being justified by the record, is clearly not justified.

The majority in the decision below stated that the Commission found that chaotic conditions existed in Buffalo causing delays and further that Buffalo lacked elevated storage facilities capable of accommodating three consecutive fifty-car trainloads of grain. The argument at best might be a reason for service disparity between Buffalo and Chicago, but not for discriminatory rates. Rate discrimination is a subject separate and apart from service discrimination. Rate discrimination must be justified on the basis of cost of transportation. Here, the evidence submitted by the railroads does not justify rate discrimination.

In *Interstate Commerce Commission v Mechling*, 330 US 567, 576 (1947), the Court stated that the declared policy of the Act requires that it must be so administered as to recognize and preserve inherent advantages of all modes of transportation. The need, which is in the public interest, is to maintain adequate and efficient water transportation service. Section 3(4), by including water carriers within the definition of connecting carriers, was intended for their protection. In *Mechling*, the Court said:

> "Carrier of ex-barge grain by eastern roads may conceivably entail more service and therefore greater costs than are involved in carrying ex-rail or ex-lake grain. If so, the eastern roads may, in certain circumstances, be justified in receiving an extra charge for that extra service wherever it is rendered. But the extra service must fit the extra charge and *cannot justify lump sum rate increases which cut into the inherent advantage of cheaper barge transportation which Congress intended to guarantee to shippers.*" (at 581) (Emphasis supplied.)

Thus, *Mechling* stands for the proposition that a disparity in rates between water carriers and rail carriers must be based on a disparity in costs.

The record does not disclose that the railroads' costs for transportation from Buffalo to Martins Creek per ton-mile is higher than that on the all-rail route. The record discloses that the rate for transportation from Buffalo to Martin Creek is .1176¢ per ton-mile while from Twin Ports to Martins Creek is .0524¢ per ton-mile and Chicago to Martins Creek is .0516¢ per ton-mile.

The State of New York suffers as a result of this discrimination in that the discrimination affects the economic life of the City of Buffalo and its labor forces. The Commission justifies its rate disparity on the finding that unit train service from Buffalo to Martins Creek is inefficient (as pointed out before the protestants were told not to argue this question). This finding might sustain a ruling that the service provided at Buffalo be different from that at Chicago, but in no way does it relate to, or affect the costs of rail transportation at either place. It therefore does not justify the rate disparity. Judge TIMBERS covered this question clearly in his dissent below (p. 354):

> "While the Commission on remand purported to give lip-service to the Supreme Court's holding in *Western Pacific Railroad Co., supra,* 356 I.C.C. at 92, its decision to permit the railroads to maintain a rail rate structure which discriminates against water carriers at Buffalo is grounded upon the following one-sentence finding:
>
> "In our view the evidence is convincing that the *establishment of a new unit-train service* over Buffalo would be inefficient, uneconomical, and counter-productive and that the existence of such operating deficiencies justify the disparity in rates or divisions as between the connecting lines." 356 I.C.C. at 92. (emphasis added).
>
> Such a finding, based not on *existing actual conditions,* but on a *hypothetical new unit-train service,* most assuredly does not comply with our mandate. And I fail to see any support for it in the Supreme Court's test set forth in *Western Pacific Railroad Co., supra.*

> The railroads, in my view, have totally failed to justify the undisputed rate discrimination which has been found, permitting ConRail to earn roughly twice as much, *after expenses*, from its Buffalo-Martins Creek route as from its Chicago-Martins Creek route."

Western Pacific Railroad v United States, 382 US 237, 246 (1965), after holding that connecting line status did not necessitate physical connection between carriers for coverage, held that the elimination of discriminatory treatment where it exists, is required. The Commission in fact did find there was discrimination between lake-rail traffic and all-rail traffic, but remedied it by providing for correction of the rates from Chicago to Martins Creek. In the order of October 19, 1979, the Court below discounted this, saying:

> 'No interest would be served by speculating on a Chicago lake-rail interchange. Once loaded at the source, economy would demand a through lake trip to Buffalo."

Overcoming discrimination at the Port of Chicago in no way helps the Port of Buffalo. The lake carriers who have equipment at Buffalo are not helped by the end of discrimination at Chicago nor are Buffalo's economic conditions and its labor problems benefited by the correction of the Chicago discrimination. The Commission's having found that there was discrimination in the rates from Chicago to Martins Creek should have also found that this discrimination existed at Buffalo, in the absence of proof of higher costs for transportation out of Buffalo. Disparity in rates for Buffalo can only be justified if it can be shown there is a disproportionately extra cost in shipping grain out of Buffalo. The record does not sustain this.

It is essential to the shippers and the people of Buffalo that this alternate method of transportation by lake and rail be kept viable. So long as it is viable, the public can hope for reasonable rates. The very fact that the winter rates, when there is no lake carrying service, are higher than in summer when their lake service is available, presages what would happen if lake carrying services were to disappear.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
April , 1980

Respectfully submitted,

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APPENDIX

APPENDIX A

(Decision of the United States Court of Appeals)

Entered in the Office of the Clerk of the United States Court of Appeals for the Second Circuit on March 2, 1977 (568 F2d 887 [1977]).

STATE OF N.Y. v. UNITED STATES

Cite as 568 F.2d 887 (1977)

STATE OF NEW YORK, Petitioner, and S & E Shipping Corporation, Intervenor,

v.

UNITED STATES of America and Interstate Commerce Commission, Respondents, and Commonwealth of Pennsylvania et al., Intervenors.

No. 212, Docket 76-4085.

United States Court of Appeals, Second Circuit

Argued Nov. 8, 1976. Decided March 2, 1977. Rehearing Denied June 6, 1977. Rehearing En Banc Denied June 6, 1977.

On petition to review an order of the Interstate Commerce Commission, 351 I.C.C. 470 (1976), approving unit train rates on wheat, the Court of Appeals, Timbers, Circuit Judge, held (i) that 60 day period for filing review petition was not to be measured from date of service of order denying request for reconsideration of initial decision approving three of the four interrelated rates; (ii) that Great Lakes carriers were entitled to avail themselves of Interstate Commerce Act's prohibition against discrimination between connecting lines notwithstanding that their carriage of wheat in bulk exempted them from regulation; (iii) that the water carriers, which transported wheat from the same midwestern points to port of Buffalo, New York (which port also was served by one of the unit train railroads and at which inter-

change of water-rail traffic could be and was effected) were "connecting lines" within meaning of antidiscrimination provision of the Act; and (iv) that neither port of Buffalo nor Buffalo flour milling interests were unduly prejudiced by failure to publish a unit train rate to Buffalo that was competitive with the water-competitive rates made available to the Martins Creek miller by rail during Great Lakes shipping season.

Petition granted; order affirmed in part and set aside in part; and case remanded in part.

1. Commerce 157

Petition to review a final order of Interstate Commerce Commission must be filed within 60 days of the entry of the order; timeliness requirement is jurisdictional. 28 U.S.C.A. §2344.

2. Commerce 157

Timeliness of petition to review order of Interstate Commerce Commission approving certain "unit train rates" for transportation of wheat was not measured by reference to date of service of order denying request for reconsideration of initial decision approving three of the four rates since rates were interrelated and not independent tariffs, Commission viewed the proceeding as still pending as a whole and in its final report and order discussed all the rates, in any event, it would have been judicially imprudent to review the initial order piecemeal while the proceedings as a whole remained pending; furthermore, respondent failed to show prejudice. 28 U.S.C.A. §§2342(5), 2343, 2344; Interstate Commerce Act, §17(7), 49 U.S.C.A. §17(7).

3. Commerce 133

Under provision of Interstate Commerce Act that an appellate division of the Interstate Commerce Commission is empowered to reverse, change, or modify the original decision "in any

respect" the appellate division is not limited to the issues on which reconsideration is granted; Commission can exercise continuing jurisdiction to suspend, reconsider or modify its orders even absent a petition for reconsideration. Interstate Commerce Act, §17(7), 49 U.S.C.A. §17(7).

4. Administrative Law and Procedure 704

Deeply rooted policy of federal courts is against piecemeal appeals and in favor of allowing administrative proceedings to run their course without judicial interference.

5. Federal Courts 595

Grant of summary judgment as to fewer than all claims or parties is not a final, appealable judgment unless the district court determines that there is no just reason for delay. Fed. Rules Civ. Proc. rule 54(b), 28 U.S.C.A.

6. Administrative Law and Procedure 704

Filing of "protective" petitions for judicial review at various points preceding completion of administrative proceedings should not be encouraged.

7. Commerce 156

Although claim that Interstate Commerce Commission's order approving certain "unit train rates" for transportation of wheat failed to protect certain lake carriers against allegedly discriminatory and prejudicial rail rates was not included in protestant's petition for reconsideration such fact did not preclude judicial review since question whether proposed rates were discriminatory against connecting line was presented to the Commission and expressly rules on its initial decision; since court had benefit of Commission's views and since a petition for reconsideration is not a prerequisite to judicial review, Court of Appeals would consider the issue. Interstate Commerce Act, §3(4), 49 U.S.C.A. §3(4); 5 U.S.C.A. §704.

8. Carriers 32(2¼)

Shipper routing exception to Interstate Commerce Act's prohibition on discrimination between connecting lines is designed to protect a railroad against charges of undue prejudice when reasons for not giving certain traffic to a particular connecting line is that the carrier is following a shipper's instructions to route traffic to another connecting line; exception does not provide a defense to a charge of rate discrimination and was not applicable to claim that unit train rates for transportation of wheat from points in the midwest discriminated against connecting Great Lakes carriers. Interstate Commerce Act, §3(4), 49 U.S.C.A. §3(4).

9. Carriers 32(1)

Just because a water carrier is exempt from regulation when it transports commodities in bulk does not mean that it is not subject to part III of Interstate Commerce Act for purposes of protection under provision of Act prohibiting discrimination between connecting lines. Interstate Commerce Act, §§3(4), 301 et seq., 49 U.S.C.A. §§3(4), 901 et seq.

10. Carriers 32(1)

Great Lakes water carriers, which held certificates of public convenience and necessity, were entitled to protection of Interstate Commerce Act's prohibition on discrimination between connecting lines, as regards unit train rates for transportation of wheat from points in the midwest to Martins Creek, Pennsylvania, notwithstanding that their carriage of wheat in bulk exempted them from regulation. Interstate Commerce Act, §§3(4), 303(b), 49 U.S.C.A. §§3(4), 903(b).

11. Carriers 32(1)

Fact that all rail route for unit train transportation of wheat from points in the midwest to Martins Creek, Pennsylvania, did

not reach Buffalo, New York, which is the terminus of lake transportation of rail-lake carriage of wheat between the same points, did not mean that the Great Lakes carriers were not "connecting lines" subject to protection of Interstate Commerce Act against discrimination between connecting lines; rather, lake carriers were "connecting lines" since they served a point also served by the railroad, i.e., Buffalo, at which point there was a direct physical connection between the rail and lake carriers. Interstate Commerce Act, §3(4), 49 U.S.C.A. §3(4).

See publication Words and Phrases for other judicial constructions and definitions.

12. Carriers 32(1)

A common point of interchange is not a prerequisite to applicability of provision of Interstate Commerce Act prohibiting discrimination between connecting lines; however, in case of discrimination against water carriers it is not the law that the rail and water interchanges need only be located on the same route; rather, a water carrier serving a point also served by a railroad is a "connecting carrier" if interchange of traffic can be effected. Interstate Commerce Act, §3(4), 49 U.S.C.A. §3(4).

See publication Words and Phrases for other judicial constructions and definitions.

13. Commerce 156

Contention that failure of railroad participating in unit train transportation of wheat from points in the midwest to Martins Creek, Pennsylvania to provide unit train rates from Buffalo, New York, terminus of water-rail shipments of wheat from the same points to Martins Creek, was prejudicial to Great Lakes carriers would not be ruled on by reviewing court where the argument was not presented to Interstate Commerce Commission for consideration in connection with its initial order or

order from any petitions for reconsideration and there were no exceptional circumstances requiring consideration despite failure to present arguments to the Commission. Interstate Commerce Act, §3(1), 49 U.S.C.A. §3(1); 28 U.S.C.A. §§2342(5), 2343, 2344.

14. Carriers 32(2¼)

Failure to make available to Buffalo, New York unit train rates applicable to shipments of wheat from points in the midwest to Martins Creek, Pennsylvania during shipping season on the Great Lakes was not unduly prejudicial to the Buffalo interests, notwithstanding that open season rate to Martins Creek was water-competitive; claim of undue prejudice was particularly weak since open season unit rate to Martins Creek is about 68% higher than unit train rate available to Buffalo and, because of difference in rail distances, unit rates to Buffalo are less expensive per mile than unit rates to Martins Creek; furthermore, Buffalo has available the original water rate. Interstate Commerce Act, §3(1), 49 U.S.C.A. §3(1).

Patrick McEligot, Washington, D.C. (Louis A. Lefkowitz, Atty. Gen., Ruth Kessler Toch, Solicitor Gen., State of New York, Albany, N.Y., Bryce Rea, Jr., Leo C. Franey, and Rea, Cross & Knebel, Washington, D.C., on the brief), for petitioner State of New York.

Robert J. Ables, Washington, D.C. (Arthur N. Chagaris, Washington, D.C., on the brief), for intervenor S & E Shipping Corp.

Hanford O'Hara, Assoc. Gen. Counsel, I.C.C., Washington, D.C. (Thomas E. Kauper, Asst. Atty. Gen., Lloyd John Osborn, Atty., Dept. of Justice; Robert S. Burk, Acting Gen. Counsel, I.C.C., Washington, D.C., on the brief), for respondents United States and Interstate Commerce Commission.

Appendix A
(Decision of the United States Court of Appeals)

C. Harold Peterson, Minneapolis, Minn., and Peter A. Greene, Washington, D.C. (Louis A. H. Pepper, New York City, on the brief), for intervenors Soo Line Railroad Co. and ConAgra, Inc.

Robert P. Kane, Atty. Gen., Commonwealth of Pennsylvania; Edward J. Morris, Counsel, John B. Wilson, Asst. Counsel, Pennsylvania Public Utility Commission, Harrisburg, Pa.; Gordon P. MacDougall, Spec. Asst. Counsel, Washington, D.C., filed a brief for intervenors Commonwealth of Pennsylvania and Pennsylvania Public Utility Commission.

Before HAYS, ANDERSON and TIMBERS, Circuit Judges.*

TIMBERS, Circuit Judge:

On this petition to review, petitioner State of New York (New York) challenges an order of the Interstate Commerce Commission (the Commission), 351 I.C.C. 470 (1976),[1] which approved certain "unit train rates" of two railroads for the transportation of wheat from points in the midwest to Martins Creek, Pennsylvania.

The essential questions presented by the petition to review are (1) whether the Commission's order failed to protect certain lake

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*Pursuant to §0.14 of the Rules of this Court, this appeal is being determined by Judges Anderson and Timbers who are in agreement on this opinion. Judge Hays heard argument on November 8, 1976, but has not had an opportunity to participate further in the case because of temporary illness.

[1]The Commission's final order of January 27, 1976, 351 I.C.C. 470, which is the subject of the instant petition to review, as well as the Commission's initial order of June 18, 1974, 346 I.C.C. 814, were both entered in the Commission's Investigation and Suspension Docket No. 8899, *Unit Train Rates on Wheat, Minn. & Wis. To Martins Creek, Pa.*

Both orders were entered by Division 2 of the Commission. The final order was entered by Division 2 acting as an Appellate Division. In the interest of brevity we refer throughout this opinion to "the Commission", unless otherwise specified.

carriers against allegedly discriminatory and prejudicial rail rates in violation of §3(4) of the Interstate Commerce Act (the Act);[2] and (2) whether the Commission's order failed to protect the lake carriers, the Port of Buffalo and other Buffalo interests against such rail rates which allegedly would divert wheat traffic away from Buffalo in violation of §3(1) of the Act.[3] A further question with respect to this Court's jurisdiction is raised by respondents' motion partially to dismiss the petition to review for lack of timeliness.

For the reasons below, we hold that we have jurisdiction to review the order of the Commission; we affirm the Commission's

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[2]Section 3(4) of the Interstate Commerce Act, 49 U.S.C. §3(4) (1970), provides:

> "All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title."

[3]Section 3(1) of the Interstate Commerce Act, 49 U.S.C. §3(1) (1970), provides:

> "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

order that the proposed rates do not violate §3(1) of the Act; but, with respect to the §3(4) claim, we set aside the order and remand the case to the Commission for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines.

I. FACTS AND PRIOR PROCEEDINGS

After the Commission's initial report and order of June 18, 1974, 346 I.C.C. 814 (1974), the State of New York was granted leave to intervene to consolidate and represent various New York interests which had opposed the proposed rates in question. New York's position on the instant petition to review is supported by intervenor S&E Shipping Corporation.

Respondents are the United States and the Commission. Their position is supported by intervenors Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, Soo Line Railroad Company (Soo) and ConAgra, Incorporated (ConAgra). Soo and Erie Lackawanna Railway Company (Erie), supported by ConAgra, were the original proponents of the proposed rates.[4]

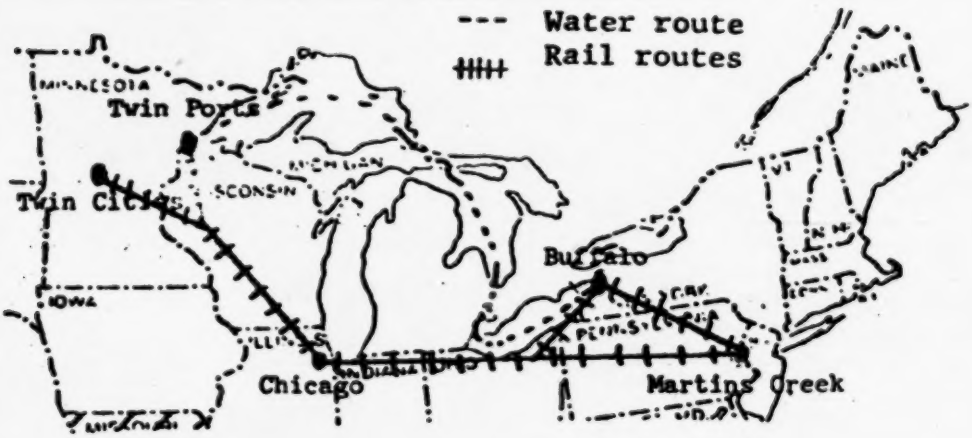
The proceedings before the Commission involved proposed unit train rates[5] on wheat transported in bulk over an all rail route

[4]The rates went into effect on June 1, 1974. By the time of the Commission's initial decision, the rates had increased. For convenience the Commission continued to refer to the rates as "proposed" even though they were in effect and it used the figures applicable to the rates as originally proposed. 346 I.C.C. at 815-16. We shall do the same in this opinion.

[5]Unit train rates generally "provide for the movement of a train comprised of shipper — or consignee — owned cars from one specified loading point to one consignee at one specified destination, and the return of the empty cars to the same origin at a specified rate per ton." *Lake Carriers' Association v. United States*, 399 F.Supp. 386, 388-89 (N.D. Ohio 1975). Unit train rates are to be distinguished from trainload and carload rates. The unit train system is a form of shuttle, here between the midwest loading points and the shipper's plant at Martins Creek. The cars in this case are not owned by the shipper, ConAgra, but by Soo.

from Minneapolis and St. Paul, Minnesota (Twin Cities) and Duluth, Minnesota, and Superior, Wisconsin (Twin Ports), to Martins Creek, Pennsylvania. The shipper, ConAgra, has its mill at Martins Creek.[6]

The following straight line diagram shows the rail routes as well as the lake route referred to below:



The proposed rates are summer and winter rates from Twin Ports and Twin Cities to Martins Creek. Soo carries the wheat from the points of origin to Chicago. Erie carries the wheat from Chicago to Martins Creek.

The summer rate from each point of origin (72.25 cents per hundredweight) is the lower rate. It applies during the season when the Great Lakes are open to navigation by lake carriers. It

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[6]ConAgra seems to be regarded as something of an upstart by the milling industry for locating its operation at Martins Creek rather than at Buffalo, which is considered the milling capital of the East. ConAgra chose to locate at Martins Creek in order to be closer to the bakeries in the East Coast markets in New York, New Jersey and Pennsylvania. It is to these markets that ConAgra ships its flour by motor carrier and the Buffalo millers ship their flour by rail.

is designed to compete with rates on the lake-rail route from Twin Ports to Buffalo by lake carrier and thence by rail to Martins Creek.

The winter rate is higher (88 cents per hundredweight). It applies only during the season when the Great Lakes are closed to navigation. It is designed to compete with rates on an all rail route, used by shippers when the Great Lakes are closed, from Twin Ports and Twin Cities via Buffalo to Martins Creek.

The proposed rates were protested by various shipper, port, carrier, and community interests.[7] By an order dated October 31, 1973, the Commission instituted an investigation of the lawfulness of the rates and suspended their operation through May 31, 1974. The Commission's initial order of June 18, 1974, 346 I.C.C. 814, found the summer and winter rates from Twin Ports and the winter rate from Twin Cities to be lawful; but it found the summer rate from Twin Cities to be unduly preferential to Twin Cities and unduly prejudicial to Twin Ports in violation of §3(1) of the Act.[8]

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[7]The protestants included, among others, lake carriers, milling companies, groups representing various Buffalo interests, and the Penn Central Transportation Company.

[8]The Commission found the Twin Cities summer rate unlawful because it was the same as the Twin Ports summer rate (72.25 cents) and did not include the cost of transporting wheat from Twin Cities to Twin Ports. The latter cost would make transportation from Twin Cities more expensive if the wheat were being transported by lake carrier to Buffalo. The Commission held that the parity of rates between Twin Ports and Twin Cities, during the season when the rail rates were supposed to be competitive with lake rates, was unduly preferential to Twin Cities and unduly prejudicial to Twin Ports in violation of §3(1). "A lawful rate from the preferred origins would be 88 cents which is substantially the product [sic] of the local 15-cent rate from Twin Cities to Twin Ports and the proposed 72.25 cent rate beyond." 346 I.C.C. at 855.

Following the Commission's initial order, New York was granted leave to intervene as stated above. Both sides thereupon filed petitions for reconsideration. On June 27, 1975, the Commission denied reconsideration of its order with respect to the three rates it had approved; but it granted reconsideration of its order with respect to the unlawfulness of the Twin Cities summer rate and "reopened [the proceeding] on the present record." Meanwhile, all four rates remained in effect. Upon reconsideration, the Commission issued its final order of January 27, 1976, 351 I.C.C. 470, affirming the lawfulness of the three approved rates and reversing its prior finding that the Twin Cities summer rate was unlawful. In short, all rates were approved and the investigation was discontinued.

It is the Commission's final order of January 27, 1976 to which the instant petition to review is addressed, invoking the jurisdiction of this Court under 28 U.S.C. §2342(5) (Supp. V., 1975) *amending* 28 U.S.C. §2343 (1970). New York seeks to have the summer and winter rates from both Twin Ports and Twin Cities declared unlawful on the ground that they violate §§3(1) and 3(4) of the Act.

II. JURISDICTION

Before turning to the merits of the petition to review, we are presented with a threshold question with respect to this Court's jurisdiction. The Commission and intervenors Soo and ConAgra (referred to as "respondents" in this section of our opinion) claim that, because of the asserted lack of timeliness of the petition to review, we have jurisdiction to review only the Twin Cities summer rate, not the other three rates. We disagree.

[1] It is common ground that a petition to review a final order of the Commission must be filed within sixty days of the entry of the order, 28 U.S.C. §2344 (1970), and the timeliness requirement

is jurisdictional. See, e.g., *Microwave Communications, Inc. v. FCC*, 515 F.2d 385, 389 & n.24 (D.C. Cir. 1974).

[2-6] Respondents argue that the sixty day period began to run on August 5, 1975, the date of service of the Commission's June 27, 1975 order. That order denied petitioners' request for reconsideration of the Commission's initial decision of June 18, 1974 which approved three of the four rates here in question. Respondents contend that the denial of reconsideration was a final order with respect to the three rates which earlier had been approved, in that the denial of reconsideration "impose[d] an obligation, den[ied] a right, or fix[ed] some legal relationship as a consummation of the administrative process." *C & S Air Lines v. Waterman Corp.*, 333 U.S. 104, 113 (1948); see *Isbrandtsen Co. v. United States*, 211 F.2d 51, 55 (D.C. Cir.), *cert. denied sub nom. Federal Maritime Board v. United States*, 347 U.S. 990 (1954). Respondents stress particularly that "a final order need not necessarily be the very last order." *Isbrandtsen Co. v. United States, supra*, 211 F.2d at 55.

Respondents' argument would be persuasive if all the petitions for reconsideration had been denied in all respects. Respondents contend that the order of June 27, 1975 terminated the proceedings as to all but the Twin Cities summer rate as completely as if the Commission had not agreed to reconsider that rate. Whatever might be said as to this theoretical contention, it wholly ignores the essential nature of the proceedings. The rates were proposed as an interrelated set of rates, not as independent tariffs. Although the Commission denied reconsideration of the three rates previously approved and granted reconsideration of the one previously disapproved, all four rates continued in effect pending reconsideration. The rate initially found to be unlawful was not cancelled, and new schedules were not filed.

Moreover, the Commission itself seems to have viewed the proceeding as still pending as a whole, notwithstanding its denial of reconsideration. In its final report and order of January 27, 1976, it discussed all the rates and affirmed and adopted the conclusions previously made with respect to the three rates as to which reconsideration technically had been denied. This was necessary because the Twin Cities summer rate was tied to the Twin Ports summer rate.[9]

As a practical matter, it would have been judicially imprudent for us as a reviewing court to consider piecemeal the initial order while the proceeding as a whole remained pending before the Commission. Indeed the Commission acknowledges in its brief before us that "[s]hould a court action be commenced under these circumstances, the Court could, in its discretion, decide to stay proceedings pending completion of the ancillary administrative proceedings." That hardly comports with our view of finality.

Even assuming that petitioners could have filed a petition to review the order approving three of the four rates immediately

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[9]Under §17(7) of the Interstate Commerce Act, 49 U.S.C. §17(7) (1970), an appellate division of the Commission is empowered to reverse, change, or modify the original decision "in any respect". The appellate division apparently is not limited to the issues on which reconsideration was granted. The Commission can exercise "continuing jurisdiction to suspend, reconsider or modify its orders . . . even in the absence of a petition for reconsideration . . . ." *Resort Bus Lines, Inc. v. ICC*, 264 F.Supp. 742, 745 (S.D.N.Y. 1967) (three-judge court) (Kaufman, *J.*).

This power to reconsider the entire record is exemplified by the proceedings below. In its final report and order, the Commission discussed the Twin Ports rates as well as the Twin Cities summer rate. It identified the rates in issue as those from Twin Ports and Twin Cities at both the summer and winter levels, recited the arguments against all the rates, and specifically adopted the prior findings and conclusions as to the Twin Ports rates in order to extend them to the Twin Cities summer rate. 351 I.C.C. at 471, 473, 478-79. In conclusion it stated: "Upon reconsideration, we find the proposed unit-train rates from Twin Ports and Twin Cities to Martins Creek to be just and reasonable and not otherwise unlawful." *Id.* at 479. Despite its earlier denial of reconsideration, the Commission appears to have reconsidered all four rates.

after denial of their petition for reconsideration, a point upon which we express no view, we are satisfied that they were justified in awaiting the outcome of the proceeding as a whole. Respondents have not shown that they were prejudiced by the passage of time. Especially in view of the deeply rooted policies of the federal courts against piecemeal appeals and in favor of allowing administrative proceedings to run their course without interference from the courts, we hold that the instant petition to review was timely with respect to the four rates in question.[10]

III. SECTION 3(4) CLAIM

[7] Turning to the merits of the petition to review, we shall consider first the claim that the Commission's order failed to protect certain lake carriers against allegedly discriminatory and prejudicial rail rates in violation of §3(4) of the Act.[11]

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[10]By analogy, a grant of summary judgment as to fewer than all claims or parties is not a final, appealable judgment unless the district judge determines that there is "no just reason for delay" pursuant to Fed.R.Civ.P. 54(b). See, e.g., *Melancon v. Insurance Co. of North America*, 476 F.2d 594 (5 Cir. 1973) (per curiam); 9 Moore's Federal Practice ¶110.07, at 108 n. 6 (Supp. 1975).

We see no reason to encourage the filing of "protective" petitions for judicial review at various points preceding completion of administrative proceedings. See generally *Outland v. CAB*, 284 F.2d 224, 228 (D.C. Cir. 1960).

[11]We reject respondents' contention that this issue is not properly before us. Although neither New York nor the Lake Carriers' Association (one of the original protestants) included this claim in their petitions for reconsideration, that does not preclude our review of the issue under *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952). In *Tucker* the point urged on review had never been presented to the administrative agency. Here the question whether the proposed rates are unlawful under §3(4) was presented to the Commission and was expressly ruled upon in the initial decision of June 18, 1974. 346 I.C.C. at 852. We have the benefit of the Commission's views on the issue. See *Great Falls Community TV Cable Co. v. FCC*, 416 F.2d 238, 239 (9 Cir. 1969); *Lake Carriers' Association v. United States*, *supra*, 399 F.Supp. at 395-96. Under the circumstances, and especially since a petition for reconsideration by the agency is not a prerequisite to judicial review, §704 of the Administrative Procedure Act, 5 U.S.C. §704 (1970), we shall consider the issue.

Section 3(4) prohibits carriers from "discriminat[ing] in their rates, fares, and charges between connecting lines. . . ." The term "connecting line" as used here means "the connecting line of any carrier subject to the provisions of [part I] or any common carrier by water subject to [part III]."

The Commission did not reach the question whether the proposed unit train rates discriminate against the lake carriers because it found that the lake carriers are not entitled to the protection of §3(4). 346 I.C.C. at 852. The Commission ruled that the lake carriers are outside the scope of the protection of §3(4) because "[s]o far as the record shows, protestant's members are not regulated carriers and, therefore, not entitled to protection under section 3(4)." The Commission also ruled that the lake carriers are not "connecting lines" within the meaning of the statute.

[8] We hold that the Commission erred with respect to both branches of its §3(4) ruling.[12]

(A) *Exempt Water Carriers Are Entitled to Section 3(4) Protection*

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[12]Respondents now suggest a third ground for denying the lake carriers the protection of §3(4), namely, that the proposed rates are not covered by that section because the traffic is "specifically routed" to the all rail route by the shipper, ConAgra, and therefore comes within the statute's exception for specifically routed traffic. Aside from being a *post hoc* rationalization for agency action, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962), the argument misinterprets the statutory language. The shipper routing exception to §3(4) is designed to protect a railroad against charges of undue prejudice when its reason for not giving certain traffic to a particular connecting line is that it is following a shipper's instructions to route the traffic to another connecting line. The exception does not provide a defense to a charge of rate discrimination. Were this not so, §3(4) would be a dead letter, for shippers obviously would be willing to route traffic in order to avail themselves of lower rail rates.

The basis of the Commission's ruling on this issue is unclear. Its ruling and supporting reasoning is confined to the following two sentences:

> "Insofar as is pertinent to the issues in this proceeding, a connecting line is defined as a common carrier by water subject to part III of the act. So far as the record shows, protestant's members are not regulated carriers and, therefore, not entitled to protection under section 3(4)." 346 I.C.C. at 852.

Intervenor Soo, in its brief before us, argues that the Commission meant that there was no evidence in the record that the protesting lake carriers are subject to part III of the Act. The Commission, however, was fully aware that some water carriers on the Great Lakes are subject to Part III.[13]

[9] We interpret the Commission's ruling on this issue to mean that carriers exempted from regulation when they carry commodities in bulk[14] are not "subject to part III" for purposes

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[13]Included in the Certified Index to the Record is the protest originally filed on behalf of the Great Lakes Ship Owners Association and its individual members. Its opening sentence identifies the protestants as "common carriers by water holding certificates of public convenience and necessity issued under Part III of the Interstate Commerce Act ...." The Commission's own public records show that certificates were issued to the non-exempt carriers. Also included in the Certified Index to the Record is the protest of the Lake Carriers' Association, one of whose members is shown by the Commission's records to hold a certificate. Under these circumstances and in view of the importance of navigation on the Great Lakes, we cannot assume that the Commission was unaware that there are water carriers on the Great Lakes subject to Part III.

[14]Section 303(b) of the Interstate Commerce Act, 49 U.S.C. §903(b) (1970), in relevant part provides:

> "Nothing in this chapter [Part III of the Interstate Commerce Act, 49 U.S.C. §§901-23] shall apply to the transportation by a water carrier of commodities in bulk ...."

of protection under §3(4). We disagree. Just because a water carrier is exempt from regulation when it transports commodities in bulk does not mean that it is not subject to part III.[15]

[10] We hold that the water carriers here involved on the Great Lakes are entitled to the protection of §3(4) although their carriage of wheat in bulk exempts them from regulation under §303(b) of the Act. See *ICC v. Mechling*, 330 U.S. 567, 576 (1947) (Black, *J.*); *ICC v. Inland Waterways Corp.*, 319 U.S. 671, 697 (1943) (Black, *J.*, dissenting) (an earlier proceeding which eventually led to the *Mechling* decision); *Valley Line Co. v. United States*, 390 F.Supp. 435, 438-39 (W.D.Pa. 1975) (three-judge court); *Seatrain Lines, Inc. v. United States*, 233 F.Supp. 199, 210 (D.N.J.1964) (three-judge court); *Atchison, Topeka & Santa Fe Ry. v. United States*, 194 F.Supp. 438 (D.Kan.1961) (three-judge court); *Arrow Transportation Co. v. United States*, 176 F.Supp. 411, 419 (N.D.Ala.1959) (three-judge court), *aff'd sub nom. State Corporation Commission v. Arrow Transportation Co.*, 361 U.S. 353 (1960) (per curiam).[16]

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[15]The Commission asserts in its brief that "[t]he only connecting carriers are Great Lakes water carriers which are *not* subject to Part III" and that "[t]his point is vigorously confirmed by S&E Shipping in its brief to this Court." What we find confirmed in S&E Shipping's brief is that the Commission cannot regulate water carriers carrying commodities in bulk; and that the Commission repeatedly has sought repeal of the §303(b) exemption, but not that this removes such water carriers from the protection of §3(4).

[16]Of these cases, only *Valley Line* explicitly discusses the issue. The question there was whether exemption from the terms of part III under §303(e) of the Act, 49 U.S.C. §903(e)(1), makes a carrier not "subject to part III" within the meaning of §5(2) of the Act, 49 U.S.C. §5(2), which, like §3(4), is in part I of the Act. *Valley Line* held that a water carrier exempt from part III nevertheless is entitled to the protection of §5(2), "relating to protection of the public interest with respect to mergers and concentration of control over carriers ...." 390 F.Supp. at 438. The court reasoned that, although the

Footnote continued on next page—

(B) *Meaning of "Connecting Line"*

[11, 12] The Commission ruled that, even if protestants were entitled to the protection of §3(4), there would be no merit to their argument. The Commission went on to state, "Section 3(4) is designed to discourage unequal treatment of connecting carriers at a given point. The proposed all-rail route passes well south of Buffalo and Erie does not extend unequal treatment at Buffalo as between carriers." 346 I.C.C. at 852. In its brief before us, the Commission supplemented this with the following explanation: "The all-rail route here involved does not reach Buffalo, the point at which New York says its connection within the meaning of section 3(4) takes place. The fact that Erie serves Buffalo on other routes does not change this conclusion." We disagree.

—*Footnote continued from preceding page*

terms of §5(2), as defined in §5(13), 49 U.S.C. §5(13), protect water carriers "subject to chapter 12 of this title [part III of the Act]", exemption from part III does not mandate exclusion from the protection of §5(2) because the policies of part I "are of general importance, and quite distinct from the specific regulatory requirements with respect to water carriers established by part III. . . ."

While the other cases cited do not discuss the issue expressly, in all of them except the *Inland Waterways/Mechling* cases the courts applied §3(4) to invalidate rail rates that discriminated against water carriers transporting commodities in bulk. The bulk commodity in all the cases except *Seatrain* was grain.

Mechling was decided under §307(d) of the Act, 49 U.S.C. §907(d) (1970). But in a general discussion of the legislative history of the Transportation Act of 1940, which added part III to the Act and extended §3(4) to water carriers, the Court noted by way of dictum that "§3(4) of the pre-existing Act . . . was amended by the 1940 Act specifically to include water carriers, such as these barge lines, within the definition of connecting carriers." 330 U.S. at 576. As in the instant case, the barge lines in *Mechling* carried grain in bulk and therefore would have been exempted from part III. Mr. Justice Black, in his dissenting opinion in the earlier proceeding (*Inland Waterways*), stated that §3(4) *had* been violated. 319 U.S. at 671.

Respondents concede that a common point of interchange is not a prerequisite to the applicability of §3(4).[17] Rather, they argue that somewhere along the all rail route there must be a point of interchange with the water carrier. In other words, so the argument goes, the point need not be the same as the point of interchange with a connecting rail line, but the respective rail and water interchanges at least must be located on the same route. We decline the invitation to adopt this construction of the statute. Respondents have not cited any authority for their interpretation. Petitioner's interpretation, on the other hand, finds persuasive support in *Seatrain Lines, Inc. v. United States,*

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[17]To the extent that language in *Western Pacific Rys. v. United States*, 382 U.S. 237, 245-46 (1965), is to the contrary, we believe it can be explained by the particular facts and the concerns of the parties in that case. In *Western Pacific*, an intermediate carrier on a through route complained under §3(4) of discrimination by a railroad with which the complainant did not connect physically. Another railroad which had not complained linked the complainant to the allegedly discriminating railroad. The Court rejected the Commission's narrow construction which would have required a complainant itself to "make a direct connection with the discriminating carrier, or be part of a through route that already includes the carrier." 382 U.S. at 242. In order to make plain that the facts of that case satisfied the requirements of §3(4), the Court held "that to qualify as a 'connecting line', *in the absence of physical connection*, a carrier need only show that it participates in an established through route, *making connection at the point of common interchange*, all of whose participants stand willing to cooperate in the arrangements necessary to eliminate the alleged discrimination." *Id.* at 245 (emphasis added). The holding simply described the facts of the case and declared them to be sufficient to qualify the complainant as a "connecting line".

In the instant case there *is* a direct physical connection at Buffalo between the lake carriers and Erie. The Court's language about a point of common interchange, referring to the through route of which the non-connecting carrier in *Western Pacific* was a part, is inapplicable to this case, as respondents concede. Indeed, *Western Pacific* stands for the proposition that the term "connecting lines" in §3(4) should not be construed restrictively.

supra,[18] and in the Commission's own decision in *Ingot Molds, Ohio & Pa. to Cypress, Texas*, 349 I.C.C. 102 (1975).[19]

We hold, on the facts of this case, that the lake carriers are connecting lines, because they serve a point also served by the

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[18]In *Seatrain* the all rail route originated at Sandow, Texas. It had connections with other rail lines at Marjorie, Texas; Longview, Texas; Texarkana, Arkansas; and one of three alternate gateways to the East (St. Louis, Mo.; East St. Louis, Ill.; or Flinton, Ill.). It finally arrived at the shipper's aluminum fabricating plants at Cressona, Pa.

The rail-water-rail route also originated at Sandow, Texas, and arrived ultimately at Cressona, Pa. The first rail link was at Marjorie, Texas, as on the all rail route. Thereafter the routes diverged. The next connection was at Texas City, Texas, where the railroad cars were loaded aboard the water carrier for shipment to a port at Edgewater, New Jersey, whence they were carried by rail to Cressona.

Thus, in *Seatrain*, as in the instant case, there was no point of interchange with the water carrier along the all rail route. It was sufficient that the water carrier "connected" with the rail carrier, in the common sense meaning of that word.

[19]The parties sharply disagree in their interpretations of the *Ingot Molds* decision. There three routes were involved, two all rail and one barge-rail. There was an interchange between barge and rail lines on one of the all rail routes (at Houston, Texas) but not on the other all rail route. The Commission held that the complaining water carrier was a connecting line and that the railroads had violated §3(4). Respondents contend that the decision was based on the fact that the barge line interchanged with the rail line on one of the all rail routes. We believe the Commission would have reached the same result had there been only the two non-intersecting routes. The decision would be pointless if it meant that the railroads could continue to maintain discriminatory rates as long as they routed traffic over the none-intersecting all rail route (via Corsicana, Texas). See diagram at 349 I.C.C. 107. The Commission itself stated that the relevant "court decisions [make clear] that a water carrier serving a point also served by a railroad is a connecting carrier within the meaning of section 3(4) of the [A]ct if interchange of traffic can be effected . . . ." *Id.* at 111; see also *id.* at 112. See generally *Oil Country Iron or Steel Pipe, Midwest to Okla. & Tex.*, 326 I.C.C. 511 (1966), 332 I.C.C. 540 (1968), *aff'd sub nom. Atchison, Topeka & Santa Fe Ry. v. United States*, 300 F.Supp. 1351 (N.D. Ill. 1969) (three-judge court).

railroad so that interchange at that point can be, and in fact is, effected. See note 19 *supra.*

(C) *Discriminatory Rates*

The Commission, having decided that the lake carriers are not "connecting lines" within the meaning of §3(4), and that they would not be protected by that section even if they were, did not reach the question whether the rates were discriminatory.[20] We therefore remand the case to the Commission for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines.

IV. SECTION 3(1) CLAIM

Petitioner claims that the Commission erred in failing to protect the lake carriers, the Port of Buffalo and other Buffalo interests from prejudicial and discriminatory rail rates and practices allegedly designed to divert wheat traffic away from Buffalo in violation of §3(1) of the Act. Petitioner's argument in support of this claim is in two branches, one of which we decline to rule upon because it was not presented to the Commission, and the other we reject on the merits.

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[20]Petitioner contends that it made out, and that the Commission's own findings indicate, 346 I.C.C. at 829, 830, a prima facie showing of a §3(4) violation. Petitioner argues in its brief:

> "[C]ost studies accepted by the Commission showed that Erie's yield under the reduced rate on the all rail route was 18 percent of fully distributed rail costs in rail-owned cars and 14 percent in shipper-owned cars whereas Erie's yield in the rail leg of the water route was approximately four to six times higher — 73 percent of fully distributed rail costs in rail-owned cars and 90 percent for shipper-owned cars. The evidence also shows that Erie would receive 40 cents to transport one hundred pounds of wheat 340 miles from Buffalo to Martins Creek but that it would receive only 47 cents per hundred pounds during the open navigation season and 57 cents per hundred pounds during the closed navigation season to transport wheat 910 miles from Chicago to Martins Creek."

Appendix A
(Decision of the United States Court of Appeals)

(A) *Prejudice to Water Carriers*

[13] This branch of petitioner's §3(1) argument (upon which we decline to rule) is based on the same facts which it urged in support of its claim of discrimination against the lake carriers under §3(4). See note 20, *supra.* Here New York argues, on behalf of the lake carriers, that Erie's failure to provide a unit train rate from Buffalo to Martins Creek is prejudicial to the lake carriers in violation of §3(1). Primary reliance is placed on *Lake Carriers' Association v. United States,* 399 F.Supp. 386 (N.D. Ohio 1975) (three-judge court).

This branch of petitioner's argument was not presented to the Commission for consideration in connection with its initial order or its order on any of the petitions for reconsideration. It appears to have been raised before us as an afterthought. In contrast to what we have said above regarding the §3(4) claim and in contrast to what was said in the *Lake Carriers'* case, 399 F.Supp. at 395-96, we decline to rule upon that issue here. The Supreme Court has admonished that "[a] reviewing court usurps the agency's functions when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Commission v. Aragan,* 329 U.S. 143, 155 (1946). We find no exceptional circumstances which would impel us to consider the issue here despite the failure to present it to the Commission.

(B) *Prejudice to Buffalo Shippers*

[14] As the other branch of its §3(1) argument, New York argues, as did the Buffalo flour milling interests in the proceedings before the Commission, that they are unduly prejudiced while ConAgra is unduly preferred by Erie's failure

to publish a unit train rate from Twin Ports and Twin Cities to Buffalo that is competitive with the open season lake rates. The rate Erie makes available to ConAgra during the open season is water-competitive. Petitioner argues that the Buffalo shippers are prejudiced because the open season unit train rate available to them is higher than, and therefore not competitive with, the lake vessel rate (43¢ as opposed to 26.67¢). Petitioner contends that equal treatment requires that open season water-competitive rates be available to Buffalo as well as to Martins Creek.[21]

The requisite elements of a §3(1) violation have been stated succinctly as follows:

> "[I]t must be shown (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, actually or potentially, (3) that the carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. The complaining party has the burden of proving the presence of the first three factors and the carriers have the burden of justifying the disparity, if possible, in connection with the fourth factor." *Chicago & Eastern Ill. R.R. v. United States,* 384 F.Supp. 298, 300-01 (N.D.Ill.1974) (three-judge court) (per curiam), *aff'd mem.*, 421 U.S. 956 (1975).

See *Louis Dreyfus Corp. v. United States,* 401 F.Supp. 919, 926-27 & n.4 (S.D.N.Y. 1975) (three-judge court).

On the facts of this case we find petitioner's claim to be particularly weak. The 72.25¢ open season unit train rate to

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[21] During the closed season the unit train rate to Martins Creek is set at a level to compete with the unit train rate to Buffalo (43¢); so petitioner does not challenge the closed season rate.

Martins Creek is about 68% higher than the 43¢ unit train rate which is available to Buffalo shippers. The rail distances from the origins to Martins Creek exceed the rail distances to Buffalo by slightly over 200 miles or about 20%. The unit train rate to Buffalo therefore is less expensive per mile than the unit train rate to Martins Creek. Furthermore, Buffalo has available to it the original water rate with which the all rail rate from Twin Ports and Twin Cities to Martins Creek is intended to compete. Petitioner nevertheless contends that the availability of a water-competitive all rail rate to Martins Creek gives ConAgra an undue advantage over the Buffalo mills because Martins Creek will have two alternative means of transportation from which to choose.[22] The Commission rejected petitioner's claims as speculative. We agree.

We hold that petitioner has not shown a disparity in rates; nor has it shown that it will be injured by the unavailability of an open season water-competitive unit train rate to Buffalo.

To summarize:

We grant the petition to review; we affirm the Commission's order that the proposed rates do not violate §3(1) of the Act; but, with respect to the §3(4) claim, we set aside the order and remand the case to the Commission for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines.

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[22]Petitioner emphasizes the importance of having an alternative when shipping on the Great Lakes is interrupted, the closed season is unusually long, or a shipper is unable to obtain needed vessels. Petitioner also argues that ConAgra will have the advantage of being able to shop for the lower transportation cost because any adjustments in rail rates to reflect changes in lake rates necessarily will not be implemented as quickly as increases in lake rates, especially because they require notice and are subject to Commission review.

APPENDIX B

(Report and Order of Interstate Commerce Commission)

Decided January 18, 1978.
Served January 30, 1978.

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 8899

UNIT TRAIN RATES ON WHEAT, MINN. & WIS. TO MARTINS CREEK, PA.

Investigation and Suspension Docket No. 8899

UNIT TRAIN RATES ON WHEAT, MINN. & WIS. TO MARTINS CREEK, PA.

Decided January 18, 1978

Upon further hearing, assailed unit-train rates on wheat from Minneapolis, Minnesota Transfer, St. Paul and Duluth, Minn., and Superior, Wis., to Martins Creek, Pa., found to be just and reasonable and not otherwise unlawful nor to discriminate unjustly against lake carriers at Chicago, Ill., provided equal rate treatment is accorded to them upon request. Findings in prior report, 351 I.C.C. 470, modified in part. Proceeding held open 90 days to afford lake carriers an opportunity to seek equal rate treatment.

Appearances as shown in prior reports, and, in addition: *John A. Daily* for respondent ConRail.

Appendix B
(Report and Order of Interstate Commerce Commission)

Robert P. Kane for the Commonwealth of Pennsylvania, intervener in support of respondents.

Robert J. Ables and *Walter C. Wallace* for S&E Shipping Corporation, intervener in support of protestants.

Leo C. Franey for the State of New York, intervener in support of protestants.

Howard Schulman for Seafarers International Union of North America, AFL-CIO, intervener in support of protestants.

REPORT AND ORDER OF THE COMMISSION ON FURTHER HEARING

BY THE COMMISSION:

In the prior report on reconsideration, 351 I.C.C. 470, Appellate Division 2 found proposed unit-train rates on wheat from Minneapolis, Minnesota Transfer, and St. Paul, Minn. (Twin Cities), Duluth, Minn., and Superior, Wis. (Twin Ports), to Martins Creek, Pa., applying at different levels during the seasons of open and closed navigation on the Great Lakes, to be just and reasonable and not otherwise unlawful. This represented a reversal, in part, of division 2's findings in the initial report, 346 I.C.C. 814, which held that the open season unit-train rate from the Twin Cities to Martins Creek was unduly preferential to inland points and unduly prejudicial to Twin Ports in violation of section 3(1) of the Interstate Commerce Act. On appeal of the report on reconsideration, the United States Court of Appeals for the Second Circuit affirmed in part and set aside in part the Commission's orders entered in the above decisions. *State of New York* v. *United States,* No. 76-4085 (2d Cir., filed March 2, 1977). The court held that the

[1]Rates, costs, and differences therein are stated in cents per 100 pounds unless otherwise indicated.

Commission's decision finding the proposed rates not to be unduly prejudicial of Buffalo, N.Y., milling interests under section 3(1) of the act was proper, but that Appellate Division 2 erred in finding that the rates were not in violation of section 3(4) of the act. The proceeding was remanded for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines. In compliance with the court order and in recognition of changed circumstances, including the creation of Consolidated Rail Corporation (ConRail) and the desirability of obtaining current data, the Commission by order entered June 9, 1977, reopened the proceeding for further administrative handling including the filing of supplementary statements by the parties in connection with the section 3(4) issues raised on remand. Supplementary statements were filed (1) by the Soo Line Railroad Company (Soo), (2) by ConRail as successor in interest to the Erie Lackawanna Railway Company (Erie), (3) by ConAgra, intervener in support of respondents, and (4) separately by the State of New York and S&E Shipping Corporation (S&E) on behalf of the protesting lake carriers. Replies to each others statements were filed by the opposing parties, including another reply by the Commonwealth of Pennsylvania. In addition, Seafarers International Union of North America, AFL-CIO, (Seafarers) was permitted to intervene and to adopt supplementary statement filed by S&E by order served September 23, 1977.

We find the statement of the case as set forth in the prior reports to be accurate in all material respects except to the extent hereinafter indicated, and as supplemented here to reflect the additional statements and replies filed by the parties on remand, affirm, and adopt it as our own. Only those facts necessary for a clear understanding of the issues raised on remand will be restated.

Appendix B
(Report and Order of Interstate Commerce Commission)

The unit-train rates in question are published on two levels reflecting a lower basis in the summer than winter for application from Twin Cities or Twin Ports to Martins Creek. The rates were originally published by the Soo Line Railroad and the Erie (now ConRail) in 1973, at the request of ConAgra, a flour milling concern located at Martins Creek. The lower summer rate applies when the Great Lakes are open to navigation by lake carriers and was set at a level designed to meet the transportation and storage charges via a water-rail route to Martins Creek through the port of Buffalo, N.Y. The higher winter rate which applies during the closed navigation season was designed to compete with the combination rates on an all-rail route to Martins Creek via Buffalo. The alternative transportation costs used in justification of the proposed open season and closed season unit-train rates, as reflected in division 2's initial decision,[2] are set forth below:

I. Proposed open season rate of 72.25 cents:

(a) 26.67 cents — transportation by nonregulated water carriers from Twin Ports to Buffalo.

(b) 5.00 cents per hundredweight — cost of elevating grain at Buffalo.

(c) 40.00 cents — five-car rail rate published by Erie on wheat from Buffalo to Martins Creek.

(d) 71.67 cents — total.

II. Proposed closed season rate of 88 cents:

(a) 43 cents — Buffalo unit-train rate from Twin Ports and Twin Cities.

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[2]Division 2's initial decision was prepared on the basis of the 72.25-cent summer rate although it recognized that as of June 1, 1974, the rate had increased to 78.25 cents.

(b) 5 cents per hundredweight — elevation charge at Buffalo.

(c) 40 cents — Erie's five-car rate from Buffalo to Martins Creek.

(d) 88 cents — total.

The protesting lake carriers took the position that their inability to compete with the involved summer rate is not due to the inherent efficiency of the all-rail route, but rather to Erie's discriminatory failure to provide comparable unit-train rates and service, distance considered, from Buffalo to Martins Creek, New York City, and Philadelphia. According to them, Erie is exercising its monopoly control of the milling area east of Buffalo to force grain traffic off the Great Lakes by keeping ex-lake rates out of Buffalo at such a high level as to be non-competitive with the involved all-rail rates. At page 852 of the initial report (346 I.C.C. 814), division 2 stated:

> Section 3(4) provides in effect that rail carriers shall not discriminate in their rates between any connecting line or unduly prejudice any connecting line in the distribution of traffic that is not routed by the shipper. Insofar as is pertinent to the issues in this proceeding, a connecting line is defined as a common carrier by water subject to part III of the act. So far as the record shows, protestant's members are not regulated carriers and, therefore, not entitled to protection under section 3(4). Aside from this, however, it is clear that there is no merit in protestant's argument. Section 3(4) is designed to discourage unequal treatment of connecting carriers at a given point. The proposed all-rail route passes well south of Buffalo and Erie does not extend unequal treatment at Buffalo as between carriers.

Appendix B
(Report and Order of Interstate Commerce Commission)

As previously indicated, the court affirmed our finding under section 3(1) of the act but remanded the proceeding for further consideration of the section 3(4) issue.

The Soo emphasizes the importance of the involved grain traffic to its overall operations. In 1976, a poor grain year, it received almost $31.8 million in revenue for handling over 2.9 million tons of grain. Approximately 60 percent of this grain originated at country origins in western Minnesota, and the Dakotas, and Montana and moved to the Twin Cities or Twin Ports. Since the unit-train rates to Martins Creek became effective on June 1, 1974, the Soo has participated in the movement of approximately 1,700 cars moving under those rates to Martins Creek. It is also pointed out that during the last 4 years, the Great Lake carriers have enjoyed a very substantial increase in total domestic shipments of wheat from the Twin Ports to Buffalo and all other Great Lakes destinations.

Table I below, as reproduced from Soo's supplementary statement, shows that domestic wheat to Buffalo increased by over 16.5 million tons, or approximately 50 percent.

TABLE I

Lake shipments of domestic wheat from Duluth-Superior for years shown (in bushels)

Year	Buffalo tonnage	Total tonnage
1973	33,485,000	33,856,000
1974	41,783,000	43,056,000
1975	45,839,000	48,839,000
1976	50,004,000	50,004,000

Source: Duluth Board of Trade Annual Reports.

Tables II, III, and IV[3] below, also reproduced from Soo's supplementary statement, reflect an updated version of data

[3]Tables II-IV assume a movement of 5,100 tons in a 50-car train.

presented by respondents in previous verified statements comparing the revenues realized from the Buffalo and Martins Creek unit-train rates as proposed in January 1974, for the total movement (table II) and for each participating carrier (tables III and IV).

TABLE II

Respondents total revenue

	Per hundred-weight	Per car	Per train
	Cents		
Duluth, Minn., to Buffalo, N.Y.[1]	71.00	$1,448.40	$72,420.00
Duluth, Minn., to Martins Creek, Pa.[2]			
(Summer) April 1, 1977 to December 16, 1977	94.50	1,927.80	96,390.00
(Winter) December 16, 1976 to March 31, 1977	123.00	2,509.20	125,460.00

[1]Item 130-C, Soo Line F. T. 526-K, I.C.C. 7923.
[2]Item 140, Soo Line F. T. 543-E, I.C.C. 7959.

TABLE III

Soo line revenue

Duluth, Minn. to Buffalo, N.Y.[1]	31.95	651.78	32,589.00
Duluth to Martins Creek, Pa.[2]			
(Summer) April 1, 1977 to September 16, 1977	33.075	674.73	33,736.50
(Winter) December 16, 1976 to March 31, 1977	43.05	878.22	43,911.00

[1]Based on Soo Line division of 45 percent of thru rate.
[2]Based on Soo Line division of 35 percent of thru rate.

TABLE IV

ConRail revenue

Duluth, Minn. to Buffalo, N.Y.[1]	39.05	796.62	39,831.00
Duluth to Martins Creek, Pa.[2]			
(Summer) April 1, 1977 to September 16, 1977	61.425	1,253.07	62,653.50
(Winter) December 16, 1976 to March 31, 1977	79.95	1,630.98	81,549.00

[1]Based on ConRail division of 55 percent of thru rate.
[2]Based on ConRail division of 65 percent of thru rate.

Appendix B
(Report and Order of Interstate Commerce Commission)

Since April 1976, the unit-train movements of wheat to Martins Creek averaged 55.36 cars and approximately 5,430 tons. At today's summer unit-train level this would generate total revenues of $102,600 per train. According to Soo, ConRail's division would approximate $66,700 per train, approximately $4,000 more than is shown in table IV above. ConRail's division of the summer unit-train rate has increased 14.46 cents since original publication (30.8 percent) whereas the five-car rate from Buffalo to Martins Creek has increased only 7 cents during the same period (17.5 percent). A chronological comparison of the alternative water-rail rates or charges from Duluth to Martins Creek with the unit-train rates in issue, as set forth in appendix I to Soo's supplementary statement, indicates that the respondents have consistently adjusted the unit-train rates to Martins Creek to reflect any changes in ConAgra's alternative transportation costs from Twin Ports via the water-rail routes.

Inasmuch as the record shows that virtually all wheat moves to Buffalo exclusively in ships owned by water carriers holding no Commission authority, the Soo argues that such non-certificated water carriers are not "connecting lines" under section 3(4) of the act. Soo further contends that a finding that the railroads have no right to compete with the water carriers in this area because of prohibitions under section 3(4) would itself constitute an extremely destructive competitive practice and thereby confer an absolute monopoly position upon the exempt water carriers.

In its supplementary statement, ConRail rejects out of hand any suggestion that it discriminates against ex-lake traffic. The five-car rate from Buffalo applies on all traffic regardless of inbound mode, and ConRail avers that it has had no requests from lake carriers to make its Chicago division of the unit-train rates in issue available to them from Chicago to Martins Creek

in connection with ex-lake grain movements. According to ConRail, its division of the summer and winter rates to Martins Creek is currently 65 percent of the revenues, amounting to 61.5 cents and 80 cents per hundredweight, respectively. These divisions are 6.13 percent and 7.97 percent, respectively, of the first-class rate ($10.03 per hundredweight) from Chicago to Martins Creek. This compares with 7.26 percent which the five-car rate from Buffalo to Martins Creek (47 cents) bears to the corresponding first-class rate from Buffalo ($6.47 per hundredweight). ConRail emphasizes that the composite winter-summer relationship (7.05 percent) is very close to the Buffalo rate basis (7.26 percent). ConRail states that it "is ready, willing and able to consider any proposal for the movement of traffic in question when received ex-water via Chicago on the same basis it presently extends to its rail connection," provided "that any services required in addition to those performed by ConRail in all-rail interchange must be at the water carrier's expense." ConRail states its ultimate position as follows:

> • • • If • • • the Commission finds discrimination in Buffalo rate vis-a-vis the Chicago 'summer' division, it will be ConRail's purpose to seek first an adjustment in the all-rail joint rate or an inter-carrier adjustment in divisions to remove any legal impediment. Failing that, ConRail will terminate its participation in the all-rail summer rate. This course is considered preferable to any adjustment in the present Buffalo basis, which could result in loss of revenue and additional controversy.

In short, ConRail intends to retain the Buffalo situation intact.

ConAgra emphasizes in its supplementary statement that it is just as important to ConAgra to have lake carriers available as an alternative to rail transportation as it is to have the railroads available as an alternative to lake transportation. Since the unit

train rates to Martins Creek became effective, ConAgra has allocated its wheat traffic to both modes on nearly an equal basis. For example, total unit-train receipts of wheat from January 1975 through May 1977 have been approximately 4.3 million bushels while lake/rail and lake/truck receipts have been 4.5 million bushels. ConAgra sincerely believes that the present situation is one of healthy competitive balance which does not discriminate against any water carrier engaged in lake carriage of grain. It is pointed out that the only lake carrier appealing the Commission's decision (S&E) holds no authority under part III of the act and that the Lake Carriers Association in a petition filed with the Commission indicated its opinion that a unit-train rate no lower than 88 cents (the current level then was 89 cents) would satisfy the interests of its grain hauling members. ConAgra notes that perhaps the best evidence of the lack of any unjust discrimination is the absence of any of the alleged victims of such discrimination from this case. ConAgra states that it has never been approached by any lake carrier indicating any interest in participating in a through movement from Duluth Superior via lake to Buffalo and thence via unit train to Martins Creek. According to ConAgra there are no facilities at Buffalo capable of accommodating three consecutive 50-car trainloads of grain as would be required in unit-train service, and that the only elevator and storage facilities which are available to ConAgra at Buffalo are controlled by its competitors in the selling of flour. Notwithstanding the foregoing, ConAgra asserts that it cannot afford to be completely dependent upon lake service because (1) the availability of lake service is seasonal while ConAgra's milling requirements are year round, (2) there is no assurance of rate stability for planning purposes in view of the exempt status of lake carrier operations, and (3) the routing of grain via Buffalo by rail is inherently inefficient due to congestion at that port entailing as long as 24-day rail transit

time to Martins Creek or three or four times as long as total rail transit time from Twin Ports to Martins Creek under the unit-train rates.

In its supplementary statement, S&E takes the position that the factual situation here clearly presents a section 3(4) violation under past court and Commission cases.[4] Also relied on by S&E is the following quote from New York State's brief before the Court of Appeals[5] for the proposition that a prima facie showing of a section 3(4) violation has been made:

> Cost studies accepted by the Commission showed that Erie's yield under the reduced rate on the rail route was 18 percent of fully distributed rail costs in rail-owned cars and 14 percent in shipper-owned cars whereas Erie's yield in the rail leg of the water route was approximately four to six times higher — 73 percent of fully distributed rail costs in rail-owned cars and 90 percent of shipper-owned cars. The evidence also shows that Erie would receive 40 cents to transport one hundred pounds of wheat 340 miles from Buffalo to Martins Creek but that it would receive only 47 cents per hundred pounds during the open navigation season and 57 cents per hundred pounds during the closed navigation season to transport wheat 910 miles from Chicago to Martins Creek.

It is argued that the above rate disparity constitutes a prima facie case of discrimination under section 3(4) which shifts the burden to the railroad to justify this disparity, citing *Western*

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[4] *ICC* v. *Mechling*, 330 U.S. 567, 576, (1947); *ICC* v. *Inland Waterways Corp.*, 319 U.S. 671, 697 (1943); *Valley Line Co.* v. *United States*, 390 F.Supp. 435, 438-39 (W.D. Pa. 1975); *Seatrain Lines, Inc.* v. *United States*, 233 F.Supp. 199, 210 (D.N.J. 1964); *Atchison, Topeka and Santa Fe Ry.* v. *United States*, 194 F.Supp. 438 (D. Kan. 1961); *Arrow Transportation Co.* v. *United States*, 176 F.Supp. 411, 419 (N.D. Ala. 1959), affirmed sub nom.; *State Corporation Commission* v. *Arrow Transportation Co.*, 361 U.S. 353 (1960) (per curiam).

[5] The same quote appeared in Soo's supplementary statement where it was pointed out that the relative numbers relied upon by the State of New York have been substantially changed.

Pacific Railroad Company v. *United States*, 263 F.Supp. 140 (1966), in support. S&E urges that the unlawfulness be removed either by requiring respondents to cancel the offending rates in issue or by mandating the establishment of proportional or joint rates under the provisions of section 307(d) of the act as was required by the court in *Lake Carriers Association* v. *United States*, 399 F.Supp. 386 (1975), and implemented, on remand, by the Commission, Division 2, in its decision and order in No. 34822, *Lake Carriers' Association, et al.*, v. *The New York Central Railroad Company, et al.*, served February 28, 1977, I.C.C. . Therein division 2 prescribed proportional unit-train rates to certain Lake Erie ports on steam coal which bear the same revenue-variable cost relationship as the all-rail unit-train rates from certain origin mines in Ohio to electric utility destinations at Detroit, Trenton or Essexville, Mich.

The State of New York's position on remand is basically the same as discussed above in connection with S&E's presentation. New York emphasizes that the existing cost data of record clearly show that the disparity in rates is unjustified and requests that the issue rates be found unlawful and that an appropriate order canceling the rates be entered. Intervener Seafarers urges that such rates should be ordered canceled in order to eliminate the inequality of treatment by which the lake carriers and their employees have been victimized since the effectiveness of the assailed unit-train rates to Martins Creek.

In their reply statements, the rail respondents and ConAgra reiterate their general position that there can be no violation of section 3(4) where, as here, no part III connecting carrier or potential shipper has any problem with the existing rate structure. They also rely on *Routing Coal from Origins on Louisville & N.R.*, 313 I.C.C. 752, 758 (1961), for the proposition that an essential prerequisite to a violation of section 3(4) of the

act respecting discrimination against connecting lines is a similarity of transportation circumstances and conditions. It is pointed out that the record as reflected in the initial report herein clearly establishes the lack of similarity as between the conditions attending the unit-train movements to Martins Creek and those attending the five-car movements of grain from Buffalo to the same destination. Due to operational handicaps, they do not believe that the establishment of unit-train service from Buffalo to Martins Creek would be practical or economical. Issue is also taken with the position of S&E and New York that the Commission's decision in No. 34822, *Lake Carriers* case, *supra,* is dispositive of this proceeding. That case was finally decided on the basis of a section 3(1) violation, and the Court of Appeals herein specifically declined to rule upon that issue when raised by New York in support of a similar position taken on appeal.

In its reply statement, the Commonwealth of Pennsylvania supports the respondents' position on the section 3(4) issue. On the other hand, reply statements by New York and S&E urge that the new information of changed circumstances recited by respondents and ConAgra is of no consequence and that similar issues raised in prior section 3(4) cases have been rejected by the Commission and the courts. These protestants adhere to their original position that the respondents have failed to rebut the prima facie showing of discrimination under section 3(4) of the act.

DISCUSSION AND CONCLUSIONS

As previously indicated, this case on appeal was remanded by the court "for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines." In the prior reports, the division never determined whether the unit-train rates to Martins Creek

discriminate against the lake carriers. Instead, section 3(4) of the act was held to be inapplicable to the lake carriers because (1) there was no evidence that they were subject to part III of the act and (2) they were not "connecting lines" because the unit-train route to Martins Creek did not pass through Buffalo. Both of these findings were rejected by the court, which held that section 3(4) was applicable to the protesting lake carriers *State of New York* v. *United States,* No. 76-4085, slip opinion at 2125 through 2132 (2nd Cir. March 2, 1977). The court concluded that the Commission was fully aware that some water carriers on the Great Lakes are subject to part III of the act. It interpreted the division's treatment of this issue as meaning that part III carriers, exempted from regulation when transporting commodities in bulk, lose the protection afforded them under section 3(4). This was not our intent in the prior decision. Appellate Division 2 findings in this regard were meant to apply only to noncertificated lake carriers which are not subject to part III. Inasmuch as the grain traffic could be handled by certificated lake carriers subject to regulation under part III and at least one such carrier is a member of protestant Lake Carriers' Association as indicated in note 13 at page 2127 of the court's decision, *supra,* we agree with the court's holding and cases cited in support at page 2128, *supra,* that part III water carriers are entitled to the protection of section 3(4) although their carriage of wheat in bulk exempts them from regulation under section 303(b) of the act. On the other hand, the court's finding that the lake carriers are connecting lines within the meaning of section 3(4) is directly contrary to the division's finding at page 852 of the initial report, *supra.* The court rejected respondents' argument on appeal that a point of interchange between the water and rail carriers "need not be the same as the point of interchange with a connecting rail line, but the respective rail and water interchanges at least must be located on the same

route." See page 2130 and note 19 of the court's decision, *supra.* Instead, the court accepted petitioner State of New York's position that since the Erie (now ConRail) serves Buffalo and also participates in the involved all-rail movements of wheat to Martins Creek, the lake carriers are connecting lines within the purview of the court decision in *Seatrain Lines, Inc.* v. *United States,* 223 F. Supp. 199, and the Commission's own decision in *Ingot Molds, Ohio & Pa. to Cypress, Tex.,* 349 I.C.C 102. We are bound by the court's holding with respect to the "connecting lines" issue. Accordingly, no further consideration will be given to the arguments of respondents and supporting parties which, in effect, challenge the court's holding on this point.

In support of their allegation the unit-train rates to Martins Creek unjustly discriminate against connecting lake carriers at Buffalo, the protestants have shown a difference in ConRail's divisions of revenue as between the Chicago and Buffalo movements to Martins Creek, which revenue disparity cannot be justified on the basis of relative costs alone. In view of this, it becomes incumbent upon the respondents to justify the difference in rate treatment as between connecting lines by a showing of substantial differences in operating conditions and circumstances attending the two movements. See *Western Pacific R. Co.* v. *United States, supra,* at page 246, where the Supreme Court stated:

> * * *, the remedy in §3(4) situations need not entail the establishment of through routes, joint rates, or indeed any particular form of relief. All that is required is the elimination of discriminatory treatment. * * * Relief is warranted only if it also appears that differential treatment is not justified by differences in operating conditions that substantially affect the alleged discriminating carrier. * * *

Appendix B
(Report and Order of Interstate Commerce Commission)

In our view the evidence is convincing that the establishment of a new unit-train service over Buffalo would be inefficient, uneconomical, and counter productive and that the existence of such operating deficiencies justify the disparity in rates or divisions as between the connecting lines.

ConRail has taken a firm position that the Buffalo to Martins Creek route would be totally unreasonable for unit-train service and that it will cancel its participation in that portion of the involved unit-train route from Chicago to Martins Creek rather than institute a new unit-train service from Buffalo to Martins Creek. In recognition of the unfavorable operating conditions attending the Buffalo-Martins Creek route, division 2 stated at page 823 of the initial report:

> Erie presently moves wheat on behalf of ConAgra from Buffalo to Martins Creek at the five-car rate of 40 cents. The shipments originate at elevators served direct or those served by the Buffalo Creek Railroad. All cars handled at Buffalo except those in unit trains move through Bison Yard, operated jointly by Erie and Norfolk & Western. Respondent's Buffalo terminal is said to be congested. Seventeen inbound and 11 outbound Erie trains and 6 inbound and 6 outbound Norfolk & Western trains comprising 3,435 cars move through the terminal each day. In addition, 430 cars are delivered daily to connections and about the same number are received from connections. Forty-one interchange and industry engines work out of the yard and there are extensive piggyback and automobile loading operations.
>
> Though Bison Yard has been modernized by installation of an electronic humping section, the congestion and weather frequently conspire to bring about delays in the handling of freight cars. * * *

Traffic studies conducted by ConAgra strongly support division 2's conclusions regarding traffic congestion and other operational deficiencies at the Buffalo railroad terminal.[6] These studies reflect that total elapsed time between arrival of cars at Buffalo for loading and the arrival thereof at Martins Creek for unloading took as long as 24 days or three to four times as long as total transit time incurred on unit-train shipments from Twin Ports to Martins Creek under the rate here in issue. Moreover, ConAgra lacks the necessary elevator and storage facilities at Buffalo deemed necessary for normal utilization of unit-train service from that port. It wants and needs at least the choice to avoid the chaotic terminal situation at Buffalo by obtaining grain over other routes at competitively priced rate levels. The proposed unit-train rates from the Twin Ports and Twin Cities afford ConAgra a constant flow of grain inventory necessary for efficient flour milling at a price competitive with Buffalo millers, which result could not be attained through the availability of unit-train service from Buffalo to Martins Creek. We conclude that the institution of a comparable unit-train service from Buffalo to Martins Creek would be inefficient and uneconomical and that the disparity in rate treatment as between Chicago and Buffalo does not constitute unjust discrimination prohibited under section 3(4) of the act.

What has been said above with respect to Buffalo does not apply to the route via Chicago to Martins Creek. Inasmuch as the operating conditions attending the ex-rail movements of grain from Chicago to Martins Creek would be substantially similar to those attending ex-lake rail movements from Chicago to Martins Creek, a refusal by ConRail to participate in joint rates and through routes with connecting lake carriers on ex-lake wheat

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[6]See also No. 35786, Feed Grains to New England, I.C.C. (served February 10, 1977), at pages 4-5.

shipments from Chicago to Martins Creek on the same basis as accorded Soo in connection with the all-rail route would unjustly discriminate against connecting part III water carriers in violation of section 3(4) of the act. ConRail states that it has received no requests from any lake carrier seeking like rate treatment on ex-lake wheat shipments from Chicago to Martins Creek, and this averment has not been disputed by the protestants. Since it appears that ConRail now stands ready and willing, upon request, to handle ex-lake traffic from Chicago on the same basis as it now handles ex-rail traffic from Chicago, there appears to be no violation of section 3(4) of the act. However, we will hold the record open in order to give any part III water carriers an opportunity to join with ConRail in the establishment of joint rates and through routes via Chicago on ex-lake shipments of wheat from Chicago to Martins Creek. In the event ConRail refuses to participate in such an arrangement on an equal basis as is now accorded Soo over the all-rail route, the lake carriers will have recourse to the Commission for appropriate relief. In this respect, where equal rate treatment can be afforded both modes at a common point of interchange (Chicago), the case at hand involving alleged discrimination against connecting lines at Buffalo, is readily distinguishable from *Western Pacific, supra, Seatrain Lines, supra,* and *Ingot Molds, supra,* relied on by the protestants, where the Commission and the courts have granted section 3(4) relief to "connecting lines" in the absence of a common point of interchange.

On further hearing, we find the proposed unit-train rates from Twin Ports and Twin Cities to Martins Creek to be just and reasonable, and not otherwise unlawful provided ConRail, upon request, extends equal rate treatment to part III water carriers on ex-lake shipments of wheat from Chicago to Martins Creek.

Appendix B
(Report and Order of Interstate Commerce Commission)

We further find that this decision is not a major Federal action affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That this proceeding be held open for 90 days from the date of service thereof in order to afford part III water carriers an opportunity to enter into joint-rate and through-route arrangements with ConRail on ex-lake wheat shipments from Chicago to Martins Creek.

By the Commission.

(SEAL)

H. G. HOMME, Jr.
Acting Secretary

356 I.C.C.

APPENDIX C

(Decision and Order of the United States Court of Appeals)

Entered in the Office of the Clerk of the United States Court of Appeals for the Second Circuit on May 7, 1979 (600 F2d 349).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 32 – August Term, 1978.

(Argued September 17, 1978 Decided May 7, 1979.)

Docket No. 78-4036

STATE OF NEW YORK,

Petitioner,

—and—

S & E SHIPPING CORP. and SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Intervenors,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents,

—and—

PENNSYLVANIA PUBLIC UTILITIES COMMISSION, CONSOLIDATED RAIL CORPORATION, SOO LINE RAILROAD COMPANY and CONAGRA, INCORPORATED,

Intervenors.

Before:

MOORE, TIMBERS and VAN GRAAFEILAND,

Circuit Judges.

Appendix C
(Decision and Order of the United States Court of Appeals)

Petition for review of Interstate Commerce Commission order upholding proposed unit-train rates from Twin Ports and Twin Cities to Martins Creek. Petition denied.

PATRICK MCELIGOT, Washington, D.C. (Bryce Rea, Jr. and Leo C. Franey, Washington, D.C., of Counsel), *for Petitioner.*

ROBERT J. ABLES, Washington, D.C. (Walter C. Wallace, Washington, D.C. of Counsel), *for Intervening Petitioner, S & E Shipping Corp.*

DAVID JAFFEE, New York, N.Y. (Schulman, Abarbanel & Schlesinger, New York, N.Y., Howard Schulman, of Counsel), *for Intervening Petitioner, Seafarers International Union of North America, AFL-CIO.*

L. MARIE GUILLORY, Washington, D.C., Attorney, Interstate Commerce Commission (John H. Shenefield, John J. Powers, III, Robert Wiggers, Mark L. Evans and Henri F. Rush, Interstate Commerce Commission, of Counsel), *for Respondents, Interstate Commerce Commission and United States of America.*

C. HAROLD PETERSON, Minneapolis, Mn., *for Intervening Respondent, Soo Line Railroad Company.*

PETER A. GREENE, Washington, D.C. (Caldwell & Greene, Washington, D.C., of Counsel), *for Intervening Respondent, ConAgra, Incorporated.*

JOHN A. DAILY, Philadelphia, Pa. (Robert M. Peet, New York, N.Y., of Counsel), *for Intervening Respondent, Consolidated Rail Corporation.*

KATHLEEN H. LARKIN, Harrisburg, Pa., Chief Counsel, Pennsylvania Public Utility Commission (Alfred N. Lowenstein, of

Counsel), *for Intervening Respondent, Pennsylvania Public Utility Commission.*

VAN GRAAFEILAND, *Circuit Judge*:

The State of New York seeks review of a 1978 order of the Interstate Commerce Commission[1] discontinuing its investigation of certain train rates alleged to discriminate against Great Lakes grain carriers in violation of 49 U.S.C. §3(4).[2] In 1977, we reversed a prior Commission order which had held that the allegedly injured lake carriers were not protected by section 3(4) and remanded for the Commission to determine whether discrimination did in fact exist. *State of New York v. United States*, 568 F.2d 887 (2d Cir. 1977). The Commission has now found that the proposed rates are not discriminatory, and the matter is once again before us for review. The facts were discussed in our prior opinion and will be referred to herein only so far as is necessary to frame the issues.

The City of Buffalo is the flour milling center of the eastern United States. Grain is hauled into Buffalo from the midwest by rail, truck, and ship, stored there in elevators, and then distributed throughout the eastern states. Since 1964, much of the rail traffic into Buffalo has been by unit-train movements originating on the Soo, Burlington Northern, or Chicago & Northwestern and connecting at Chicago with either the Erie, Norfolk & Western, or Penn Central.

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[1] *Unit Train Rates on Wheat, Minn. & Wis. to Martins Creek, Pa.*, 356 I.C.C. 82 (1978).

[2] So far as pertinent, §3(4) prohibits carriers from discriminating in their rates, fares, and charges between connecting lines.

Appendix C
(Decision and Order of the United States Court of Appeals)

A unit-train consists of fifty or more cars, made up, transported, and delivered as a unit. Intertrain and intratrain switching are eliminated. The cars move under a single "gang" waybill. They are returned as a single intact group to the original point of shipment. Clerical work for routing and billing is minimal. Unit-train service permits better utilization of cars, and locomotive and crew needs can be planned with some predictability. It is an efficient and economical method of handling bulk shipments. However, it is not available for movements eastward from Buffalo to places such as Martins Creek, Pennsylvania.

For the first year after ConAgra opened its flour mill at Martins Creek in March 1973, it received its grain from Buffalo mills. That portion which had been delivered to Buffalo by rail had come over 1100 miles from Twin Ports or Twin Cities at a unit-train rate of 43 cents per 100 pounds. The 340-mile rail movement from Buffalo to Martins Creek was at a five-car rate of 40 cents per 100 pounds. Obviously, the latter rate was higher per mile than the former. The rate eastward from Buffalo was the same, however, regardless of whether the grain movement into Buffalo from the west was by ship, rail, or truck. Clearly, no carrier from the west could claim that it was being discriminated against because of the higher Buffalo to Martins Creek rate.

In September 1973, Soo and Erie published rates for unit-train movements from Twin Ports and Twin Cities, bypassing Buffalo and going directly to Martins Creek. The tariff, which became effective on June 1, 1974, called for open navigation season unit-train rates of 72.25 cents per 100 pounds and closed navigation season unit-train rates of 88 cents per 100 pounds. Petitioner contends that these rates, although more expensive per mile than the unit-train rates into Buffalo and more expensive overall

than the lake-rail rates to Martins Creek, discriminated against lake carriers transporting grain into Buffalo.[3] The Commission disagrees.

Congress has committed to the Commission "the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination." *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344, 352-53 (1940). Our review of the Commission's determination is limited in nature; we may not set it aside if it was within the Commission's statutory power to make and is supported by substantial evidence. *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534-36 (1946); 5 U.S.C. §706. Evidence may be substantial without being weighted in favor of the Commission's holding. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966). If it would justify a trial court in refusing to direct a verdict, it will withstand judicial scrutiny on review of the Commission's order. *Illinois Central Railroad Co. v. Norfolk & Western Railway Co.*, 385 U.S. 57, 66 (1966). We think the evidence in the instant case satisfies these requirements.

Chicago, where ConRail's haul originates, is a common point of interchange for both lake and rail traffic. It is a large grain

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[3]Petitioner bases its argument upon a comparison of the new rates with the Buffalo to Martins Creek rate. For Erie's 910-mile leg from Chicago to Martins Creek, the open navigation season rate under the new tariff provided revenue of .0516 cents per mile. The 340-mile haul from Buffalo to Martins Creek provided Erie with revenue of .1176 cents per mile. These rates have been increased since 1974, but the relationship between them remains substantially the same. The present open season rate of 94.5 cents gives ConRail (Erie's successor) .0675 cents per mile revenue on its haul from Chicago to Martins Creek; and an increased rate of 47 cents per 100 pounds from Buffalo to Martins Creek gives ConRail .1382 cents per mile revenue on that haul. ConRail's net revenue over both variable and fully allocated costs is higher on the Buffalo to Martins Creek run.

market with extensive storage facilities and elevators capable of loading unit-trains of fifty or more cars. ConRail may move unit-trains of grain from that connecting point directly to Martins Creek without going near the City of Buffalo. On the other hand, it may detour 200 miles into Buffalo, a second lake and rail connecting point, and go from there to Martins Creek. (See map in our prior opinion, 568 F.2d at 891).

On the first hearing before the Commission, the protestants challenged the proposed unit-train rates from Twin Ports and Twin Cities because similar unit-train rates were not made available to elevators in Chicago. Their contention that this unavailability violated sections 4(1) and 3(1) of the Act was rejected by the Commission. Following remand, however, the Commission held that operating conditions attending ex-rail and ex-lake movements of grain from Chicago to Martins Creek would be substantially similar and that it would be a violation of section 3(4) if ConRail refused to participate in joint rates and through routes with lake carriers at Chicago on the same basis as it did with the Soo Railroad. ConRail has indicated its willingness to do so. However, no request for such service has yet been made by any lake carrier.

In summary, then, the record shows ConRail moving grain between Chicago and Martins Creek, with two possible points of interchange with lake traffic, Chicago and Buffalo. At Chicago, ConRail is prepared to enter into equal rate arrangements with all connecting carriers. At Buffalo, all connecting carriers are already treated the same.

The Interstate Commerce Act's prohibition against discrimination requires that all should be treated the same under the same or similar circumstances. *Pittsburgh & W.V. Ry. Co. v. United States*, 41 F.2d 806, 810 (N.D. Ohio 1929), *aff'd*, 281

U.S. 479 (1930). Put another way, "[s]ection 3(4) requires equality of treatment between connecting lines but equality of treatment involves comparable conditions. . . ." *Atlantic Coast Line Railroad Co. v. United States,* 205 F. Supp. 360, 365 (M.D. Ga.), *aff'd,* 371 U.S. 6 (1962) (per curiam). With respect to lake traffic, the yardstick for measuring discrimination is "the compensation received by the outbound rail carrier on ex-rail traffic from the same port to the same destination." *Arrow Transportation Co. v. United States,* 176 F. Supp. 411, 419 (N.D. Ala. 1959), *aff'd,* 361 U.S. 353 (1960). The Commission was satisfied in this case that, where comparable conditions between lake and rail carriers existed, equal rate treatment was available and that, accordingly, there was no violation of section 3(4).[4]

The Commission found that it would be inefficient and uneconomical for ConRail to institute unit-train service between Buffalo and Martins Creek that would be comparable to its unit-train service from Chicago. The Chicago unit-train rate is applicable to shipments consisting of at least three consecutive unit-trains of at least fifty cars each. ConAgra is the only shipper capable of receiving grain in such quantities at Martins Creek, the destination to which the proposed tariff applies. The Commission found that a "chaotic" traffic situation existed at the Buffalo terminal causing inordinate traffic congestion and delay on shipments to Martins Creek.[5] This, plus the lack of elevator and storage facilities at Buffalo capable of ac-

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[4]The lake carriers say they have no desire to go to Chicago; that they prefer to go to Buffalo. By the same token, ConRail could argue that, insofar as Martins Creek's shipments are concerned, it preferred to go to Chicago rather than to Buffalo.

[5]The Commission found that the elapsed time between the arrival of cars at Buffalo for loading and the arrival at Martins Creek for unloading was as much as 24 days, or three to four times as long as for the haul from Twin Ports to Martins Creek.

commodating three consecutive fifty-car trainloads of grain, would prevent ConAgra from securing the constant flow of grain inventory necessary for efficient and competitive milling. The existence of such "operating deficiency", the Commission found, justifies a disparity in rates as between the connecting lines at Buffalo and those at Chicago.

ConAgra has not requested the installation of unit-train service between Buffalo and Martins Creek. Significantly, neither has petitioner nor any lake carrier. Petitioner simply requests this Court to order the cancellation of the unit-train rates from Twin Ports and Twin Cities to Martins Creek because the Buffalo to Martins Creek rates are proportionately higher and more profitable. However, there was substantial evidence to support the Commission's finding that unit-train service was more efficient and economical than movement in single of five-car lots[6] but that normal utilization of unit-train service was not available on the Buffalo to Martins Creek haul. This determination is properly entrusted to the enlightened judgment of the Commission. *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286 (1934). Our judicial function is exhausted if there is a rational basis in the evidence to support the Commission's conclusion. *Consolidated Carriers Corp. v. United States*, 321 F. Supp. 1098, 110 (S.D.N.Y. 1970), *aff'd*, 402 U.S. 901 (1971).

Upon remand, the Commission properly received additional evidence as to the effect of the disputed tariffs. *Rush v. Gardner*, 273 F. Supp. 753, 755 (N.D. Ga. 1967). This showed that, between

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[6]In addition to the customary economies incident to unit-train movements, the tariff requirement of three consecutive movements eliminates the cost of assembly and breakup of trains after each movement. Moreover, in this instance, the cars involved are furnished by the Soo, thus effecting a substantial additional saving for ConRail.

1973 and 1976, annual shipments of wheat to Buffalo by lake carrier increased by over 16.5 million tons, or approximately fifty percent. It disclosed also that, despite the adoption of the challenged unit-train rates, about fifty percent of ConAgra's wheat requirements are still transported by lake carrier and seventy percent of all grain movements from Buffalo to Martins Creek are by truck. This evidence gives little support to petitioner's claim of discrimination.

The petition for review is denied, and the Commission's order of January 18, 1978, is affirmed.

TIMBERS, *Circuit Judge*, dissenting:

More than two years ago, this Court remanded this case to the ICC "for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines." *State of New York v. United States*, 568 F.2d 887, 897 (2 Cir. 1977).[1] Our remand was a narrow one which called for a specific determination on a precise issue. As the author of our earlier opinion remanding the case to the ICC, it is crystal clear to me that the Commission on remand either has misconstrued our mandate or has ignored it. 356 I.C.C. 82 (1978). I therefore dissent from today's majority opinion which denies the petition to review and affirms the Commission's order of January 18, 1978.

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[1]Our prior opinion was rendered by Judges Anderson and Timbers. The third member of the panel, Judge Hays, who heard the argument, was not able to participate further because of temporary illness.

Our order remanding the case to the ICC to determine whether the proposed rates discriminate against the lake carriers as connecting lines followed our holding (1) that the Commission had erred in its interpretation of §3(4) of the Interstate Commerce Act in finding that the lake carriers were not entitled to protection under §3(4), and (2) that the lake carriers were not "connecting lines" within the meaning of the statute. 568 F.2d at 894-97.

The crux of the Commission's error is that, rather than making a determination of the discrimination issue on the basis of *existing actual conditions* on the Buffalo-Martins Creek run (which was the clear import of our remand), it has come up with a decision based on a *hypothetical new unit-train service* (which is totally beyond the scope of our mandate). In short, the Commission has simply not made the determination required by our mandate.

It is undisputed on the record before us that a rate differential, unjustified by cost differences, has been shown. The Commission so found. 356 I.C.C. at 92. The precise issue therefore is whether the railroads can justify charging twice as much to transport wheat over a rail route that connects with a water carrier than over the competing rail route that connects with another railroad, despite the fact that the rail revenue yield on the water-rail route is substantially higher than the yield on the competing rail route.

Under these circumstances, the rule of *Western Pacific Railroad Co. v. United States*, 382 U.S. 237 (1965), becomes applicable, namely, that relief to eliminate discriminatory rate treatment which is prohibited by §3(4) of the Interstate Commerce Act, 49 U.S.C. §3(4) (1976), is warranted if "that differential treatment is not justified by differences in operating conditions that substantially affect the allegedly discriminating carrier." *Id.* at 246. In short, the burden is on the railroads here to justify the differential on the basis of different operating conditions on the two routes referred to above, see *Seatrain Lines, Inc. v. United States*, 233 F.Supp. 199, 209 (D.N.J. 1964) (three-judge court), by showing that it would be unfair or unjust to require equal treatment by the allegedly discriminating carrier. *Western Pacific Railroad Company v. United States*, 263 F.Supp. 140, 145 (N.D. Cal. 1966) (three-judge court, on remand

from Supreme Court). See *I.C.C. v. Mechling*, 330 U.S. 567, 581 (1947).[2]

While the Commission on remand purported to give lipservice to the Supreme Court's holding in *Western Pacific Railroad Co., supra*, 356 I.C.C. at 92, its decision to permit the railroads to maintain a rail rate structure which discriminates against water carriers at Buffalo is grounded upon the following one-sentence finding:

> "In our view the evidence is convincing that the *establishment of a new unit-train service* over Buffalo would be inefficient, uneconomical, and counter-productive and that the existence of such operating deficiencies justify the disparity in rates or divisions as between the connecting lines." 356 I.C.C. at 92. (emphasis added).

Such a finding, based not on *existing actual conditions*, but on a *hypothetical new unit-train service*, most assuredly does not comply with out mandate. And I fail to see any support for it in the Supreme Court's test set forth in *Western Pacific Railroad Co., supra.*

The railroads, in my view, have totally failed to justify the undisputed rate discrimination which has been found, permitting ConRail to earn roughly twice as much, *after expenses*, from its Buffalo-Martins Creek route as from its Chicago-Martins Creek route. *See* Majority Opinion at 2521 n. 3.

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[2]Perhaps some clue to the error into which I think the majority has fallen in the instant case is its failure to consider the controlling Supreme Court cases of *Western Pacific Railroad Co., supra*, and *Mechling, supra;* nor does the majority refer in any way to the closely analogous three-judge court cases of *Seatrain Lines, supra*, and *Western Pacific Railroad Co., supra* (on remand).

In many respects the instant case is analogous to *Seatrain Lines, Inc. v. United States, supra.* There it was claimed that operating disadvantages on the water-linked rail route justified clearly discriminatory rates. The three-judge district court, after holding that the Commission's finding of no discrimination under §3(4) was in error, remanded the case to the ICC. The ICC here has failed even to make a finding pursuant to our remand, relying instead on a hypothetical proposed new unit-train service.

I can appreciate the desire of my colleagues to draw down the curtain on this prolonged litigation. It has involved three Commission decisions and two petitions to review in this Court. Our prior decision of two years ago reviewed and remanded the two prior Commission decisions. Nevertheless, I do not believe that we can let the Commission's latest decision stand without unleashing endless mischief from a precedent standpoint.

Since the Commission's findings demonstrate that the discriminatory rail rates are not justified and are unlawful under §3(4) of the Act, I believe that a further remand to the Commission would be an exercise in futility. I therefore would direct the Commission to enter an order (within a reasonable period of time to allow any aggrieved party to seek Supreme Court review) cancelling the rates under investigation in this docket which have created the unlawful discriminatory rate structure. This may seem strong medicine. But strong medicine is precisely what should be prescribed to remedy the flagrant

violation of §3(4) of the Interstate Commerce Act disclosed by the undisputed record before us.[3]

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[3]Despite my disagreement with the majority's essential holding which denies the petition to review and affirms the Commission's order of January 18, 1978, I do agree with the majority's holding in the following respects:

(1) It was proper for the ICC to make part of the record on remand the supplemental statements of the parties. *Rush v. Gardner*, 273 F.Supp. 753, 755 (N.D. Ga. 1967) (three-judge court). As a practical matter, agency efforts on remand to keep the factual record fresh should not be discouraged.

(2) There was no error in the ICC's determination to include a Chicago rate in its decision after remand. That rate, however, does not cure whatever discrimination may exist at Buffalo. The purpose of §3(4) was to prevent railroads from exercising discretion in serving connecting carriers. That is exactly what offering the equivalent rate to grain carried by lake shippers but at Chicago only would allow ConRail to do.

(3) That intervenor S&E Shipping falls within the protective umbrella of §3(4), even though we differ over how much protection the umbrella affords in the instant case.

APPENDIX D

(Order of the United States Court of Appeals)

Order of the United States Court of Appeals, Second Circuit, dated October 3, 1979.

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of October, one thousand nine hundred and seventy-nine.

Present:

HONORABLE LEONARD P. MOORE
HONORABLE WILLIAM H. TIMBERS
HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judges.

STATE OF NEW YORK,

Petitioner,

—against—

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

S & E SHIPPING CORP., SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, SOO LINE RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION (CONRAIL), CONAGRA INCORPORATED, PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Intervenors.

78-4036

Appendix D
(Order of the United States Court of Appeals)

Three petitions for rehearing and/or rehearing *en banc* have been submitted by the State of New York, the Seafarers International Union of North America, AFL-CIO, and S & E Shipping Corp., respectively.

Before deciding on a rehearing, it seems appropriate to request the parties, by further briefs, to clarify their interests, financial and otherwise, with respect to the rates in issue. We pose the following questions:

1. Who are the lake carriers, if any, in this proceeding and how are they being discriminated against?

2. Is the 40-cent rate from Buffalo to Martins Creek discriminatory and if so, how?

3. Are there other issues than the summer rates?

4. Is there any question that the all-rail rates from the grain sources to Martins Creek are not proper?

5. What effect, if any, does the trans-shipment of grain at Buffalo from lake to rail have on the over-all rates from source to Martins Creek?

6. What is ConAgra's position with respect to the respective lake-rail, all-rail transportation rates?

No interest would be served by speculating on a Chicago lake-rail interchange. Once loaded at the source, economy would demand a through lake trip to Buffalo. Nor should there be argument based on bringing 50-car unit trains into Buffalo and shipping from that point to Martins Creek.

It serves no beneficial purpose merely to say that the Commission did not comply with the Court's previous limited remand which SIU states was "to determine whether proposed

rates on the all rail route discriminated against lake carriers on the water-rail route". (SIU, Petition p. 2). To S & E Shipping Corp. the Commission was "to decide if there was discrimination, at Buffalo, not with the Chicago connection. . . ." (S & E Petition p. 3).

However, the Buffalo-Martins Creek rate is not *per se* determinative of discrimination but only as related to the total rates from grain source to Martins Creek via lake-rail or all-rail methods of transportation. We had assumed that this Court was being asked "to order the cancellation of the unit-train rates from Twin Ports and Twin Cities to Martins Creek because the Buffalo to Martins Creek rates are proportionately higher and more profitable".

THEREFORE, IT IS HEREBY ORDERED that before deciding the petitions for rehearing, the parties shall submit briefs in response to the above questions on or before October 19, 1979.

/s/ Leonard P. Moore
LEONARD P. MOORE

/s/ William H. Timbers
WILLIAM H. TIMBERS

/s/ Ellsworth A. Van Graafeiland
ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.

(FILED OCT 3, 1979)

APPENDIX E

(Order of the United States Court of Appeals)

Order of the United States Court of Appeals, Second Circuit, dated January 31, 1980, denying a rehearing *en banc.*

UNITED STATES COURT OF APPEALS

Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirty-first day of January, one thousand nine hundred and eighty.

STATE OF NEW YORK,

Petitioner,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

S.&E. SHIPPING CORP., SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, SOO LINE RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION (CONRAIL), CONAGRA INCORPORATED, PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Intervenors.

Docket No. 78-4036

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the State of New York, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN

APPENDIX F

(Order of the United States Court of Appeals)

Order of the United States Court of Appeals, Second Circuit, denying petitions for rehearing.

UNITED STATES COURT OF APPEALS

For The Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of January, one thousand nine hundred and eighty.

PRESENT:

HONORABLE LEONARD P. MOORE
HONORABLE WILLIAM H. TIMBERS
HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judges,

STATE OF NEW YORK,

Petitioner,

—against—

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

S & E SHIPPING CORP., SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, SOO LINE RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION (CONRAIL), CONAGRA INCORPORATED, PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Intervenors.

78-4036

Appendix F
(Order of the United States Court of Appeals)

The Court having carefully considered the briefs of the parties filed on the petitions for rehearing, Judge Moore and Judge Van Graafeiland adhere to the holding of the majority opinion filed on May 7, 1979 and Judge Timbers adheres to the reasoning expressed in his dissent. It is therefore

ORDERED that the petitions be, and the same hereby are, denied.

/s/ Leonard P. Moore
LEONARD P. MOORE, *Circuit Judge*

/s/ Ellsworth A. Van Graafeiland
ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge*

I dissent for the
reasons stated in
my panel decision.

/s/ WM. H. TIMBERS
USCJ

APPENDIX G

(Statute Involved)

Interstate Commerce Act (49 U.S.C. §3. par. [4]) provides:

§3. par. (4). Interchange of traffic. All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

APPENDIX H

(Order of the Interstate Commerce Commission, dated May 27, 1977)

ORDER JUN 9 1977

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 27th day of May, 1977.

INVESTIGATION AND SUSPENSION DOCKET NO. 8899

UNIT TRAIN RATES ON WHEAT,
MINN. & WIS. TO MARTINS CREEK, PA.

Upon consideration of the record in the above-entitled proceeding including the report and order of the Commission on reconsideration, Division 2, acting as an Appellate Division, 351 I.C.C. 470 (1976); and,

It appearing, That in its decision dated March 2, 1977, the United States Court of Appeals for the Second Circuit, in *State of New York* v. *United States*, et al., No. 76-4085, found protestant lake carriers (1) subject to part III of the Interstate Commerce Act, (2) entitled to the protection of section 3(4) of the Act, and (3) protected under section 3(4) as connecting lines within the meaning of that section; accordingly, the order of the Commission was set aside and the proceeding remanded for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines;

And it further appearing, That, in compliance with the Court order, changed circumstances, including the creation of Consolidated Rail Corporation and the desirability of obtaining current data, necessitate that the record be supplemented with statements by the parties:

Wherefore, and for good cause:

Appendix H
(Order of the Interstate Commerce Commission, dated May 27, 1977)

It is ordered, That this proceeding be, and it is hereby, reopened for further administrative handling in accordance with the mandate of the Court, and that within 30 days from the service date of this order, the parties shall file supplementary statements in accordance with the Commission's General Rules of Practice, 49 CFR 1100, and that replies thereto may be filed within 20 days from the due date of the supplementary statements.

By the Commission (Commissioners Gresham and Christian not participating).

ROBERT L. OSWALD
Secretary

(SEAL)